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OCT 9 1891
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 39.

SYLVESTER H. KNEELAND, *Appellant,*

vs.

C. L. LUCE & COMPANY, JOHN T. NEWTON, THE NATIONAL BANK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLANT.

ROBERT G. INGERSOLL,
JOHN M. BUTLER,
Counsel for Appellant.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States,

SYLVESTER H. KNEELAND,
Appellant,

vs.

C. L. LUCE, JOHN T. NEWTON, THE NATIONAL BANK OF MOUNT PLEASANT, IOWA, *et al.*,
Respondents.

October Term, 1891.
No. 39.

Appeal from the Circuit Court of the United States for the District of Indiana.

Statement of Facts.

I.

A few years ago an effort was made to construct a system of narrow gauge railroads connecting Cincinnati, Toledo and St. Louis. This was finally accomplished by the consolidation of roads. Most of these roads were only partly built; some had failed, while others were in process of construction.

The Toledo, Delphos and Burlington Railroad Company was created by the consolidation of certain corporations of the States of Ohio and Indiana, and after such consolidation, a contract was made on the 31st day of August, 1880, between a corporation known as the Frankfort and State Line Railroad Company, being a corporation of the State of Indiana, and the Western Construction Company,

a corporation of the State of Ohio. By this contract (found on page 236 of the Record) the Western Construction Company undertook to construct the Frankfort State Line Railroad between Frankfort, Clinton County, Indiana, and a point on the State line between Indiana and Illinois, in the County of Vermilion. In consideration of the construction of such line, the Frankfort and State Line Railroad Company agreed to deliver to the Western Construction Company its first mortgage bonds at the rate of ten thousand dollars a mile, secured by a first mortgage on all the property of the Frankfort and State Line Railroad Company, and the entire capital stock of said company. In addition, the Frankfort and State Line Railroad Company agreed to raise local aid and subscriptions from individuals or by the votes of townships to the amount of four thousand dollars a mile, and to secure the right of way for the whole line. This contract was entered into on the 31st day of August, 1880.

It may be well enough to state at this point that this contract was never carried out, and that the Western Construction Company never built said road for the Frankfort and State Line Company and never received any bonds of said company.

Afterwards, on the 12th day of February, 1881 (see page 262 of the Record), the Toledo, Cincinnati and St. Louis Railroad Company was incorporated. The object of this corporation was to build, complete, maintain and operate a railroad from a point on the dividing line between the States of Ohio and Indiana, in Adams County, Indiana, to a point on the dividing line between the States of Indiana and Illinois, in Vermilion County, Indiana, and to connect it with railroads then built or being built or thereafter to be built in said State of Ohio, and running to and terminating at the City of Toledo, Ohio, and also to form a continuous line of railroads to East St. Louis on the Mississippi River in the State of Illinois.

It will be noticed that this covers the line of the Frankfort and State Line Railroad Company.

Afterwards, on the 4th day of October, 1881 (page 285 of the Record), the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, parties of the first part, and the Toledo, Cincinnati and St. Louis Railroad Company, a corporation organized and existing under the laws of the State of Illinois, consolidated, and in said consolidation it is recited that the Toledo, Cincinnati and St. Louis Railroad Company of the first part, is a corporation organized under the laws of the States of Indiana and Illinois, by consolidation duly had and made by and between a company of the same name and the Vermilion and State Line Railroad Company, for the purpose of locating and operating a railroad extending from the dividing line between the States of Ohio and Indiana, in Adams County, Indiana, where the Toledo, Delphos and Burlington Railroad intersects said State line; thence through various counties to a point on the south line of the County of Vermilion, in the State of Illinois, near the crossing of said line by the Danville and Southwestern Railroad. It is also further recited in said articles of consolidation that the Toledo, Cincinnati and St. Louis Railroad Company, party of the second part, is a corporation organized and existing under the laws of Illinois, by virtue of consolidation duly had and made between the Tuscola, Charleston and Vincennes Railroad Company, and the Charleston, Neoga and St. Louis Railroad Company, for the purpose of constructing, locating and operating a railroad *extending from a point on the State line of Indiana and Illinois, in Vermillion County, Illinois, where the Frankfort and State Line Railroad intersects said State line, and extending thence through the County of Vermillion and other counties in said State of Illinois, to the City of East St. Louis, County of St. Clair,*

State of Illinois. The object being to own and operate a continuous line from the City of Cincinnati, Ohio, to East St. Louis, Illinois. The name of the consolidated company was the Toledo, Cincinnati and St. Louis Railroad Company.

The corporations consolidating under the name of the Toledo, Cincinnati and St. Louis Railroad Company, had, by former consolidations, absorbed the Frankfort, St. Louis and Toledo Railroad Company, the Kokomo and Marion Railroad Company, the Marion and Ottowa Railroad Company, the Toledo, Delphos and Burlington Railroad Company and several others.

On the 9th day of June, 1881, the Western Construction Company, a corporation created under the laws of Ohio, entered into a contract with the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, for the construction of certain parts of its line. According to this contract (page 239 of the Record), the Western Construction Company agreed to procure the right of way, land and material, and to perform the necessary work, to build a railroad and to put the Toledo, Cincinnati and St. Louis Railroad Company in possession, extending from a connection with the Toledo, Delphos and Burlington Railroad, in the City of Kokomo, Howard County, in the State of Indiana, and thence extending through the Counties of Howard, Clinton, Tippecanoe, Montgomery, Fountain, Parke and Vermilion, in the State of Indiana, and then through the Counties of Vermilion, Edgar, Douglass, Coles, Cumberland, Shelby, Fayette, Montgomery, Bond, Madison and St. Clair, in the State of Illinois, to East St. Louis, and being about 270 miles in length, passing through or near the Cities of Frankfort and Eugene, in Indiana, Ridge Farm, Oakland, Charlestown, Neoga and Ramsey, in the State of Illinois.

Right here it may be well enough to call the atten-

tion of the Court to the fact that in the agreement made on the 31st day of August, 1880, between this same Western Construction Company and the Frankfort and State Line Railroad Company, the line of the railroad is described "*from Frankfort, Clinton County, Indiana, to a point on the State line between Indiana and Illinois to a point on the State line from Eugene, Vermilion County, Indiana.*" In the same contract it was provided that the Western Construction Company was to build the same and to cause the road, when completed, to be made a part of the railroad of the Toledo, Delphos and Burlington Railroad Company.

It will thus be seen that the line of railroad which the Western Construction Company agreed with the Toledo, Cincinnnti and St. Louis Railroad Company to build (said agreement being dated June 9, 1881) covered exactly the same ground mentioned in the contract between the Frankfort and State Line Company and the Western Construction Company, on August 31, 1880, and was in fact a second agreement to build the same line from the City of Frankfort to the State line between Indiana and Illinois.

In the last contract mentioned it is provided that in consideration of building the road according to the specifications set forth in the contract, the Western Construction Company was to receive $3,000,000 in first mortgage bonds of the Toledo, Cincinnati and St. Louis Railroad Company, par value, and $3,000,000 second mortgage income bonds of the same company, par value, and $4,000,000 of the capital stock of the same company.

Attention is also called to an agreement made on the 12th day of April, 1881, between the Western Construction Company and the Toledo, Delphos and Burlington Railroad Company (page 937 of the Record).

From all these contracts it appears that the West-

ern Construction Compnny undertook and agreed to construct the whole line, so far as it needed construction, from Toledo, Ohio, to East. St. Louis, Illinois.

It further appears that the Western Construction Company received substantially all the bonds and stock issued by the Toledo, Cincinnati and St. Louis Railroad Company in consideration of the construction of the line.

II.

The Frankfort and State Line Railroad Company never constructed any line and never issued any bonds. There was an answer put in by said Frankfort and State Line Railroad Company (Record, page 96), in which occurs the following: "The defendant admits that as matter of fact it never did issue or deliver its bonds and mortgage to the Western Construction Company or to any person or persons in pursuance of the understanding and agreement aforesaid." This answer was made by its pretended president James H. Rice.

The Frankfort and State Line Railroad Company not only failed to build any line in accordance with its articles of association, but failed to build any line anywhere. The line was built by the Toledo, Cincinnati and St. Louis Railroad Company, and paid for by its bonds and its stock.

On page 1056 of the record is a letter from this same James H. Rice, the pretended president of the Frankfort and State Line Railroad Company. It seems that there was difficulty in collecting the donations that had been voted by townships along the line, and one difficulty was that no road had been built in accordance with the articles of association of the Frankfort and State Line Railroad Company, and in the letter of James H. Rice, written to W. J. Craig, President of the Western Construction Company under date of June 12, 1882, is the follow-

ing: "I found during my recent visit to Frankfort that some sort of action was necessary at once in the cases of Morrison & Son, also Isaac Porter's case, the last named gentleman I was advised by Col. Clark made serious threats which seemingly would jeopardize our tax in Vermilion County, Indiana, the collection of which is a matter of great doubt; at any rate, Porter threatens, if his claim is not allowed, he will show that the Frankfort and State Line Railroad is not properly located (in accordance with articles of association) on the western boundary of Indiana. Since coming here I have examined the matter and find he is correct as you will observe by turning to Article 3, page 4 of Directors' record and then referring to the tracing which I enclose herewith. The dotted line on tracing includes the railroad. The blank endorsed will show you the location of section in Town 17, so that by comparison you can readily ascertain the present location and that which was contemplated in articles of association."

William J. Craig, President of the Western Construction Company, testifies (Record, p. 225) that the Western Construction Company built the road between Frankfort and State line, and that the same was built by virtue of a contract between the Western Construction Company and the Frankfort and State Line Railroad Company. He afterwards admits that the Western Construction Company never received any bonds from the Frankfort and State Line Railroad Company (Record, page 228), giving as a reason that the Western Construction Company never asked the Frankfort and State Line Railroad Company for any bonds. He also says that the Frankfort and State Line Railroad Company was to be consolidated with the Toledo, Cincinnati and St. Louis Railroad Company as was orignally intended, and on the same page admits that the contract was made between the Western Construction Company

and the Toledo, Cincinnati and St. Louis Railway Company, by virtue of which the Western Construction Company was to build the road from Kokomo to East St. Louis. This covered the same ground that the Frankfort and State Line Railroad Company did, and that the Toledo, Cincinnati and St. Louis Railroad Company was to issue three millions first mortgage bonds, three million second mortgage bonds and four millions in stock for the construction of. He is then asked the following question (Record, page 228): "Do you mean to be understood that instead of demanding the bonds provided for in your contract with the Frankfort and State Line Company, you took the bonds of the Toledo, Cincinnati and St. Louis Company, secured by that mortgage as provided for in this contract?

A. I presume we did.

Q. You know that you did not ask for nor receive the Frankfort and State Line bonds?

A. I know that; yes, sir.

Q. And you know the money used in building the road came from Mr. Ballou, who was placing these Toledo, Cincinnati and St. Louis bonds?

A. Yes, sir; I made my drafts on him and never inquired where he got his money to pay them. I knew, of course, he was handling the bonds of the entire system.

Q. I will ask you if any consolidation of the Frankfort and State Lines was formed, as provided for in the contract with the Frankfort and State Line Railroad Company?

A. It was not.

Q. State why?

A. Because our attorney advised us that if we consolidated the Frankfort and State Line with any other company, that it would prevent the collection of a very considerable amount of local—which had been voted by the townships along the line of road.

Q. After the construction contract with the Toledo, Cincinnati and St. Louis Company was en-

tered into, state whether or not it was the design that the construction of the Frankfort and State Line Road should be taken as a part performance of the contract with the Toledo, Cincinnati and St. Louis?

A. I so understood it, and I think it was understood generally so.

Q. What I mean is you contracted with the Toledo, Cincinnati and St. Louis to complete its entire road from Kokomo to East St. Louis, did you not?

A. Yes, sir.

Q. You built the Frankfort and State Line as a part performance of the Toledo, Cincinnati and St. Louis contract, did you, and turned it in on that contract?

A. Yes, sir."

It appears from the evidence that the Toledo, Cincinnati and St. Louis Company put on record its mortgage or deed of trust securing the three million first and the three million second bonds.

Mr. Craig states that the mortgage was recorded in Frankfort; that there was never any secret made about it, and that the execution of the mortgage must have been known to the directors and promoters of the Frankfort and State Line Railroad. He further states (Record, page 231) that these men knew that the money did not come from the sale of Frankfort and State Line bonds to build the road because no such bonds were sold, and as matter of fact that such bonds were never signed and that the mortgage was never recorded; also that the Western Construction Company abandoned the idea of calling on the Frankfort and State Line Railroad Company for any bonds, because a provision had been made for issuing the T., C. & St. L. bonds that were taken in lieu thereof, and that the Western Construction Company expected to get its money out of the sale

of the bonds of the Toledo, Cincinnati and St. Louis, secured by the mortgage of July 23, 1881.

He then states (Record, page 232), that the Western Construction Company received one million eight hundred thousand dollars in the stock of the Frankfort and State Line, and that he received it as president of the Western Construction Company, and then had possession of it as Receiver of the Toledo, Cincinnati. and St. Louis Co. On Record, page 232, he admits that the Western Construction Company received about forty thousand dollars of the local aid that had been voted; that some eleven miles had been built on which was due some twenty-four thousand dollars, and that was paid by the Western Construction Company. He also swears (Record, page 232), that the bonds of the T., C. & St. L. were given to them on the mileage basis. The evidence shows that they received something over twenty-two thousand dollars a mile.

On Record, page 249, Alfred A. Thomas swears that the Frankfort and State Line road was turned over to the Toledo, Cincinnati and St. Louis, in April, 1882; that the T., C. & St. L. at first objected, but at last agreed to take it. On page 251 it appears that all the stock of the Frankfort and State Line Company was issued to the Western Construction Company, except two hundred thousand dollars. Mr. Thomas was the attorney of the Toledo, Cincinnati and St. Louis Railroad Company, and it seems was an officer also of the Frankfort and State Line, holding one share of its stock. Afterwards he was the attorney of Mr. Craig, who became the receiver of the Toledo, Cincinnati and St. Louis Railroad Company.

This witness states that the reason the Frankfort and State Line was not consolidated was that such consolidation was postponed because its consoldation would cancel the right to collect the tax; that is to say, the local aid that had been voted.

From this witness, it appears that the bonds of the Frankfort State Line were never called for, and that the Toledo, Cincinnati and St. Louis Railroad was constructed and paid for by money received from the sale of its bonds, secured by a mortgage on its line from Kokomo to East St. Louis. He also states, at page 255, that he prepared the mortgage of July 23, 1881, executed by the Toledo, Cincinnati and St. Louis Railroad, and that he was present at all the meetings wherein it was authorized or ratified by the company, and that that part of the railroad lying between Frankfort and the State line was intended by the parties to that mortgage to be covered by it.

Mr. Thomas also states that when General Corse became president of the Toledo, Cincinnati and St. Louis Railroad Company, he met the persons interested in the Frankfort and State Line, including the president and entire Board of Directors, and that they had with General Corse, a full talk at Frankfort, and then stated that he, Corse, should take possession of the road and name whatever Board of Directors he might wish to chose; he did so and organized a new board, and thereupon the witness became one of the directors. This witness was elected president of the Frankfort and State Line Company and Chairman of Executive Committee, and continued so until they celeted Mr. Rice, and then elected the witness Thomas, vice-president. He states that the Western Construction Company never asked for the mortgage from the Frankfort and State Line Railroad; on the contrary, the Western Construction Company caused the Toledo, Cincinnati and St. Louis mortgage from St. Louis to Kokomo, to be executed and they accepted it in lieu thereof, intending and expecting at that time by consolidation to ratify it.

The witness further states that these facts were known to all the officers of the Frankfort and State

Line Road; that it was under discussion before them many a time, and the mortgage was on record in each county in which the Frankfort and State Line Road was, and it was known to everybody that took any pains to be informed about the road, or how it was being built.

At that time James H. Rice, President of the Frankfort and State Line Railroad Company, was in the employ of the Western Construction Company, was the confidential man, and W. J. Craig was the president of it, and knew more about it than witness did. He was the right-of-way agent, the man on whose ability and everything else Craig most relied in all the matters in the construction of the road.

In addition to this it appears (Record, page 256) that from and after the time the Toledo, Cincinnati and St. Louis took possession of what was known as the Frankfort and State Line, that it kept it up at its own expense, paid the balance of the construction bills; paid the right-of-way debts, procured additional right-of-way, built fencing; paid for the right-of-way, and took the right-of-way in the name of the Toledo, Cincinnati and St. Louis Railroad Co.

It will also be seen from the testimony of John M. Corse (commencing on page 412) that what is known as the Frankfort and State Line Railroad was a part of the Toledo, Cincinnati and St. Louis and that it was constructed by it, and this witness states (on page 415) that it was for the purpose of issuing securities on the consolidated road and negotiating them, and that it was contemplated completing the entire road to East St. Louis, which would include the Frankfort and State Line Road, which was to be made a part of the main road and was to be covered by its first mortgage.

He also states that the Western Construction Company was to furnish and complete entire the property which was subsequently known as the

Toledo, Cincinnati and St. Louis Railroad, and on which the securities were to rest. He says there were no conditions with reference to the recognition of any encumbrance on the Frankfort and Kokomo or Frankfort and State Line Roads, and if there were any encumbrances they were to be removed. He further shows (Record, page 415) that the executive officers of the Toledo, Cincinnati and and St. Louis Company were authorized to execute a contract with the Western Construction Company whereby there should be given to the Toledo, Cincinnati and St. Louis all the authorized stock of the Frankfort and State Line Railroad Company, save what was held by third persons, and should release to the Toledo, Cincinnati and St. Louis all claims to bonds of the Frankfort and State Line Railroad Company and all claims against the same of any name and nature. This witness also swears that the stock of the Frankfort and State Line Railroad Company held by the Western Construction Company for the benefit and security of the Toledo, Cincinnati and St. Louis Railroad Company. He further states that he does not think (Record, page 417) there was any agreement by which the Construction Company had the right to hold said stock until the debts of the Western Construction Company incurred on other parts of the line were paid. On Record, page 418, General Corse swears that all these bonds of the Toledo, Cincinnati and St. Louis Railroad Company were turned over to George William Ballou, agent of the Western Construction Company.

Mr. Henry D. Hyde, who it seems was at one time solicitor for the T., C. and St. L. Road (Record, page 425), seems to have been misled precisely as the Court below was, so far as the facts are concerned. He says: "After I had been elected a director in the road, I learned to my great surprise that there was no mortgage on that portion of the road known as the Frankfort and State Line. I had understood

that there was a mortgage extending through East St. Louis, and that bonds had been issued and sold covering the whole line from Toledo, or from Delphos, if that was the place where the western portion of the T.,C. and St. L. started. I at once made an examination to find out why no mortgage was upon the road, and found that an old corporation had been acquired; that bonds had been issued upon it and the money from the bonds had been put into a contract, what was known as the Frankfort and State Line, but that the road had never been consolidated, was a separate corporation, and no mortgage had ever been issued upon its line, and that the stock of this Frankfort and State Line corporation was held outside of the board of the T., C. and St. L. R. R. As I say, I was a great deal disturbed at the fact, and, without communicating to even the directors that it might be talked over, I went to work to see if I could in any way get control of that road. As the result, I secured the stock and caused it to be turned over to the American Loan and Trust Company to protect that part of the road."

If this witness had made inquiries, he would have found that the road in question, had been in fact built and paid for by the Toledo, Cincinnati and St. Louis Railroad Company; that no bonds had ever been issued by the Frankfort and State Line, and he also would have found that the stock of the Frankfort and State Line was in the possession of the Western Construction Company, and that this same Western Construction Company had built this same line under a contract with the Toledo, Cincinnati and St. Louis Railroad Company, receiving therefor over twenty-two thousand dollars in bonds per mile, and that the stock in equity belonged to the Toledo, Cincinnati and St. Louis Railroad Company. He would also have found that the T., C. and St. L. Company had executed its mortgage on that road, and that it

had been duly recorded in every county to secure six millions in bonds.

Mr. Hyde states, on page 425 that he did get possession of the eighteen hundred thousand dollars in stock and had it transferred to him, holding the stock to make a title for the road. On Record, page 427, Mr. Hyde says that he had no difficulty in getting the stock and that he paid nothing for it. *He also says that there was no claim on the part of the Western Construction Company that the T., C. and St. L. had not turned over all securities that it had agreed to, and that the construction debts talked about were debts for which the contractors were liable.*

This witness also states that some of the sub-contractors were about to attach the Frankfort and State Line stock, and thereupon the Company assumed the liability in consideration of the surrender of the Frankfort and State Line stock, (which the same witness swears that he already had,) and that unless something had been done the sub-contractors would have attached this stock (Record, page 432), and in consequence the trust agreement was finally made, to which attention will be called hereafter.

Mr. Darling, who was a director of the company, swears (Record, page 474) that he did not know of any consideration paid or agreed to be paid to the T., C. and St. L. Company for assuming the construction debts and pledging the stock.

W. J. Craig, who was appointed Receiver of the T., C. & St. L. Co. on the 14th of August, 1884, wrote Mr. Eppstein, of Frankfort, Indiana, in regard to this matter (Record, p. 580). In this letter he says: "*The Frankfort and State Line was built with the proceeds of the sale of the T., C. & St. L. bonds.*" In the same letter he says: "If anybody comes nosing around, tell them to go to the devil, and I will protect you. Suggest to Bayliss that perhaps it would

be well for you to place the books in my keeping, partly because I am out of the State, and partly because as Receiver of the T., C. & St. L., I can better protect the records belonging to any part of the system."

On Record, p. 629, Mr. Dickson, who, was an attorney for the certificate holders, swears that if the Western Construction Company had built the road according to its contracts with the T., C. & St. L., it, the T., C. & St. L., would have owned the Frankfort and State Line stock. This same witness swears that he understood that Craig held this Frankfort and State Line stock for the purpose of compelling the T., C. & St. L. to pay the sub-contractors (Record, p. 530).

W. J. Craig (Record, pp. 704, 705), again gives his understanding of the matter, in which he says: "The only connection I had with it (meaning the trust agreement) or interest I had in it, was in settling up the affairs of the Western Construction Company." Prior to that time he says that he held the Frankfort and State Line stock, and that he delivered it in pursuance of that agreement; that he held the Frankfort and State Line stock by agreement of the creditors of the Western Construction Company on the one hand and the officials of the T., C. & St. L. Railroad Co. on the other hand, or rather of the Delphos Trust; that he so held that stock by agreement of those two parties until the construction debts of the Western Construction Company should be paid. He admits that he had an interest in having the Western Construction Company's affairs straightened out, and that he was interested on that account, and that he wished to avoid liability as a stockholder of the Western Construction Company. He further admits that the officials of the railroad company or of the Delphos trust did not know of the existence of the stock until after it was issued, and that it was in his

possession at the time the contract was made. The same witness states that this stock was issued by Rice and Thomas as secretary and president of the State Line Road, and that the agreement was made in New York with Hyde and Pomeroy on the part of the railroad company and three of the directors of the Western Construction Company.

John Felt Osgood (Record, p. 732) states that the sale of this Frankfort and State Line stock was ordered two or three times, and that he, as chairman of the bondholders, stopped it; that this stock was to be sold in Boston; that Mr. Thomas was his representative at Chicago; that he received his information as to the necessity of protecting the Frankfort and State Line road from Mr. Hyde; that he understood that by the sale of that stock sixty-seven miles of the road of the T., C. & St. L. would be taken out, and that he advocated issuing the Receiver's certificates for the protection of the road. This same witness was chairman of the committee that made the settlement, and he states (Record, p. 753) *that he did not know at the time the settlement was made that the Frankfort and State line had been built by the bonds of the T., C. & St. L. Co.; did not know that the bonds had been issued on that very line; did not know that the bonds of the T., C. & St. L. had been issued for building the Frankfort and State Line.* He further states that he was acting under the counsel of Henry D. Hyde (p. 754). The same witness (p. 755) says, that he did not suppose at the time of the settlement that they were putting a lien on the property prior to the first mortgage bonds; that he made no such contract, and that he never authorized any such contract to be made.

Richard Olney, in his testimony, states (Record, p. 785) that the Western Construction Company employed various contractors to carry out the contracts, but that they were to be paid by the Toledo, Cincin-

nati and St. Louis; that at the time the Frankfort and State Line stock was held by the Western Construction Company it had been paid. He also states (same page) that he did not know that the Western Construction Company built the Frankfort and State Line under the direction of the T., C. & St. L., and had actually been paid the full price, but did suppose that they had built another road called the Frankfort and State Line, and had received its stock in payment of their contract price, which they were now willing to dispose of to the T., C. & St. L. Co.

It is perfectly clear from this evidence that the Western Construction Company made a contract with the Frankfort and State Line Railroad Company to build the line, and that before they had done any work upon this line another contract was entered into between the Toledo, Cincinnati and St. Louis Railroad Company and the Western Construction Company to build a line from Kokomo, Indiana, to East St. Louis, and that the last mentioned line covered the line known as the Frankfort and State line. That the Western Construction Company built the road under the contract with the Toledo, Cincinnati and St. Louis Company, and received from that company over $22,000 in bonds per mile and about $15,000 of stock; that the railroad company complied absolutely with the contract on its part, and that the Western Construction Company failed in part to comply with its contracts. It also appears that the Western Construction Company turned the road over to the Toledo, Cincinnati and St. Louis Company, and that that company long before it took possession of the property had executed a deed of trust to secure the payment of $3,000,000 first and $3,000,000 second mortgage bonds, and that this mortgage had been duly recorded along the whole length of the line.

III.

The stock of the Frankfort and State Line Railroad Company was handed over by virtue of a contract appearing on page 218 of the record, and in which, among other things, it is recited that the Western Construction Company entered into a contract with the Frankfort and State Line Railroad Company, which had been performed, whereby the Construction Company was to receive the whole of the capital stock of the Frankfort and State Line Railroad Company, less what might be required to be issued for local subscriptions; and in the same contract it is stated that the Frankfort and State Line Railroad was intended to be a part of the line of the Toledo, Cincinnati and St. Louis, extending from Kokomo, Indiana, to East St. Louis, Illinois, and "has been in fact built by the proceeds of the Toledo, Cincinnati and St. Louis Railroad mortgage laid upon its line between the points aforesaid," and then it is set out in said contract: "That, whereas said Western Construction Company, for value, agrees to sell and assign its right and title to said stock to the Trustee of the Delphos Trust for the sole purpose of effecting a consolidation of said Frankfort and State Line Railroad Company, and said Toledo, Cincinnati and St. Louis Railroad Company and of then turning the said stock into said Toledo, Cincinnati and St. Louis Railroad Company in full settlement of construction contracts," and "whereas, as a condition of said sale and assignment of said stock by said Western Construction Company it was agreed that the same should be held back and reserved and not be deliverable until certain debts and obligations of the Western Construction Company contracted in building said road should be paid, and said Western Construction Company released therefrom."

There is then attached a Schedule A, setting forth the debts to be thus paid, and then it is provided in

said contract that the Toledo, Cincinnati and St. Louis Railroad Company should assume said debts and obligations set forth in Schedule A, and the obligations specified in Schedule B; the Frankfort and State Line Railroad Company admits full and sufficient performance of the contract by the Western Construction Company, and agrees to deliver the balance of its capital stock, to wit, eighteen hundred thousand dollars par value.

The Western Construction Company then delivered to the American Loan and Trust Company the said stock in trust as security for the payment of the debts which had been assumed by the T., C. & St. L., as specified in Schedule B. It was then provided that the stock should be turned over to Elmer P. Howe, the then Chairman of the Toledo, Cincinnati and St. Louis Railroad Company, freed from any further duty or liability. It was also provided that if the debts were not paid as set forth in Schedule B, that after thirty days notice the stock might be sold and the money arising from such sale applied in the payment of such debts.

According to the schedule, there was due to H. S. Hopkins & Co., $33,861.25; to Cochran & Brown, $17,790.73, subject to a certain set off; to W. F. Ritchie & Co., $1,138.90, subject to another settlement to be entered in Schedule B; to Kapp & Co., $1,924.42; to Patrick Dowling, according to Schedule A, $3,750; to the Iowa Construction Company, $37,500, and to Beeson & Hammond, $1,294.62.

According to Schedule B, there was due H. S. Hopkins & Co., $35,254.15; to Cochran & Brown, $23,217.83; to the Iowa Construction Company, $39,035.07; to Patrick Dowling, $3,901.84; to Beeson & Hammond, $13,677.12.

On Schedule B are the names of W. F. Ritchie & Co.; also Kapp & Co., but no amounts.

Afterwards a petition was filed to enforce the

claim of Ritchie & Co. This claim was not included in Schedule B of the trust agreement of March 20, 1883 (Record, page 138). The Court ordered that the claim of Ritchie & Co. be placed on Schedule B, and there were afterwards issued to Richie & Co. in Receiver's certificates, the sum of $12,921.98, with interest.

All these claims were made by the sub-contractors; that is, by persons who had contracted with the Western Construction Company, as follows:

IV.

The Claims.

1st. The claim of H. S. Hopkins & Co., based on a contract made with the Western Construction Company in July, 1881, was for the construction of the line between the Illinois Central Railroad at Ramsey, Illinois, and East St. Louis, Illinois. This work was completed in March, 1883. As matter of fact all of the work was construction work, and was done after the execution of the mortgage by T., C. & St. L. Railroad Company, and after the same was duly recorded. The settlement was made on April 4, 1883, when the Toledo, Cincinnati and St. Louis Railroad Company assumed the debt and delivered its notes (Record, page 135).

2d. The claim of Cochran & Brown was based on a contract made on June 14, 1881, for furnishing timber work, including cattle guards, &c., for the Charleston, Neoga and St. Louis Railroad, which became a part of the Toledo, Cincinnati and St. Louis line. The work was completed in October, 1882; lien notice was given on November 15, 1882, but there is no evidence to show whether any was served or whether any suit to enforce the lien was instituted. This claim was finally settled in 1883,

by the Toledo, Cincinnati and St. Louis Railroad Company giving its notes (Record, page 135).

3d. The claim of Beeson & Hammond was based on three contracts made in April and July, 1882, for grading and laying of track between Ramsey and New Douglass, Illinois. The work terminated in January, 1883. No evidence is offered to show that any lien notice was ever filed and served, or any suit instituted, although there was some oral testimony that some proceeding was commenced. A letter was produced from the counsel of the Railroad Company, showing pendency of these proceedings in March, 1883, but the records of the Court in which these proceedings were said to have been brought, it is claimed, had been lost. All the contracts were made and executed after the mortgage of the Toledo, Cincinnati and St. Louis was made and recorded (Record, page 135).

4th. The claim of Patrick Dowling rests on three contracts made May 10, June 24 and October 20, 1881; the first contract was for grading between Charleston and Neoga, Illinois; the second for grading between Neoga and Cowden, Illinois; the third contract was for track laying between Neoga and Charleston, Illinois. In October, 1882, Darling filed a claim for extra compensation for damages for detention in the work and loss of profit. There is oral testimony to show that some legal proceedings to perfect the lien were instituted at Toledo, Illinois, but record and Court House all burned (Record, page 136).

5th. The claim of Kapp & Co. is based on an account for ties sold and delivered to the Western Construction Company prior to November 3, 1882. The final amount stipulated to be paid by the trust agreement of March, 1883, was $1,731.98. It is reported by the Master that they were used afterwards by the Receiver on the Dayton and South-

eastern Division in Ohio, but as matter of fact they were used by the Western Construction Company (Record, page 136.)

6th. The claim of the Iowa Construction Company is based on a contract made February 22, 1881, between Barnes & Co. and the Western Construction Company, and which was assigned by Barnes & Co. to the Iowa Construction Company, which assignment was accepted by the Western Construction Company. It was for building that part of the road from Clark's Hill, Indiana, to State line, and thence 20 miles southwest in Illinois, being about 55 miles in Indiana and 10 miles in Illinois. Work began in 1881 and was finished in February, 1882. The contract between the Western Construction Company and the Toledo, Cincinnati and St. Louis Railroad Company was made in June, 1881. Certificates were issued for $33,750. The work under the contract was completed February 5, 1882. It was conceded by the holders of the certificates that nine-tenths of the work was done in Indiana and one-tenth in Illinois. The lien was filed and sought to be perfected in Illinois for the whole sum due, including the work done in Indiana as well as the work done in Illinois. This lien was filed February 24, 1882 (Record, page 137).

It will be seen that only one-tenth of the work was done in Illinois and yet the lien was filed in Illinois for all the work.

7th. The claim of Henry McPherson grew out of a contract made July 21, 1881, with the Western Construction Company to build a portion of the line of the T., C. & St. L. in Illinois. The work terminated August 31, 1882, and the lien notice was filed September 20, 1882, and suit instituted January 31, 1883. This firm was not included in the trust agreement of March, 1883, and to enforce their claim separate

proceedings were commenced in United States Circuit Court. On the 16th of April, 1884, McPherson & Co. filed an intervening petition, and by orders of the Court the trustees of the first mortgage bondholders, and other parties interested, were made parties thereto. The case was referred to a master, and after hearing, a decree was entered authorizing the Receiver to issue certificates to the amount of $20,000 (Record, page 137).

8th. The claim of Ritchie & Co. is based on an account for lumber and ties sold and delivered between April 11, 1881, and July 20, 1882. It was not included in Schedule B of the trust agreement. Subsequently an intervening petition was filed. Testimony was taken and the Court ordered the claim to be placed on Schedule B, and authorized the Receiver to issue certificates to the amount of $12,-921.98, with interest, and made these certificates a first lien. The Master reports (page 138) that the debts for which all these certificates were issued were for construction, and further, that a large part of the claim of Richie & Co. was for materials delivered on the St. Louis Division and used in the construction of the Ohio Division south of Delphos, a part of such materials having been used by Receiver Craig in December, 1883. Master also reports (Record, page 138) that the date of the consolidation forming the Toledo, Cincinnati and St. Louis Railroad Company, which executed the mortgage under which the present bondholders claim, was July 20, 1881. The mortgage was executed July 23, 1881, and the first record was August 1, 1881, in the State of Indiana, and the first in Illinois, August 4, 1881, and that all the settlements of Hopkins & Co., Cochran & Brown, Beeson & Hammond, Patrick Dowling, Kapp & Co. and the Iowa Construction Company were made, and notes taken under the trust agreement of March 20, 1883,

and that the McPherson settlement was made upon a stipulation that it should not prejudice any lien which he had upon the railroad.

V.

As to these Claims for which the certificates in question were issued.

From the evidence, it appears that a settlement was made between the T., C. & St. L. and what is known as the Delphos Trust and these various sub-contractors; the T., C. & St. L. Railroad Company then gave its notes to these various sub-contractors for the amounts claimed to be due, and these contractors, at least those having liens or pretending to have liens, dismissed their suits and took the notes of the Toledo, Cincinnati and St. Louis Railroad Company.

The question then arises, on the supposition that all that was done, whether these notes in any possible event can be superior to the lien of the mortgage. Suppose the notes to have been perfectly good; that is to say, suppose the company had received a consideration for the notes, would they, under such circumstances, create a lien superior to the mortgage?

Suppose that one of the sub-contractors had a perfect lien at law and had filed his papers for the purpose of protecting that lien, and that thereupon the company had settled with him and had given its notes; under such circumstances would the notes be superior to the first mortgage bonds?

But in this case we are not driven to that supposition. As a matter of fact the company owed no debt to any sub-contractor. The Western Construction Company owed the debts, if anybody owed them, and the Western Construction Company had received from the Toledo, Cincinnati and St. Louis Company

its full pay, consequently the undertaking of the Toledo, Cincinnati and St. Louis Railroad Company to pay the debts of the Western Construction Company was not simply a gratuity but a fraud.

The reason for this fraud was that the principal men in the Western Construction Company were also the principal men in the Toledo, Cincinnati and St. Louis Railroad Company. The question for them to decide was whether they would pay their own debts, or make a contract by virtue of which other people should pay their liabilities.

Of course they took the ground that it was better for the Toledo, Cincinnati and St. Louis Railroad Company to pay these obligations than for the Western Construction Company. Because if the Railroad Company paid the debts, the money would come out of the bondholders of that corporation. But if the Western Construction Company paid the debts, then these gentlemen individually would be compelled to furnish the money.

In order to accomplish this result, that is, to compel other people to pay their obligations, they pretended that the Frankfort and State Line Railroad Company owned sixty-seven miles of this line, although they knew that the Frankfort and State Line Railroad Company had never built it, had never paid for it; and also knew that it was not built under any contract with that company; also knew that it was not built on the line that had been located by that company; knew that it was built under a contract between the Western Construction Company and the Toledo, Cincinnati and St. Louis Railroad Company by which the Western Construction Company had bound itself to finish the road and turn it over completed to the Toledo, Cincinnati and St. Louis Company; knew that the last mentioned company had paid in full for such construction, and consequently knew that the claim put up for the Frankfort and

State Line Railroad Company was without the slightest foundation either in law, equity or fact.

Yet under these circumstances the Receiver of the Toledo, Cincinnati and St. Louis road—officers of the Western Construction Company, officers of the T., C. and St. L. Company, went before Judge Drummond and represented to him that the holders of the stock of the Frankfort and State Line Railroad Company were the owners of sixty-seven miles of that road; that this stock had been put up as collateral security for the debts owing to sub-contractors, and that unless Receiver's certificates were issued this stock would be sold, and the purchasers of the stock would become the equitable owners of sixty-seven miles of the line, all of which was done and stated for the purpose of misleading the Court, to the end that the bondholders of the Toledo, Cincinnati and St. Louis Railroad Company might be compelled to pay the debts of the Western Construction Company.

VI.

As to the Validity of the Claims.

1st. The claim of H. S. Hopkins & Co.

The evidence shows that no work was done under this contract until after the mortgage of July 23, 1881 was executed and recorded, and no suit was commenced for the purpose of perfecting or enforcing a lien until the 9th day of March, 1883. The evidence also shows that the notice was not served as prescribed by the statute, and that all the work done was simply construction work, and all done after the execution and recording of the mortgage of July 23, 1881.

Now, on the 4th day of April, 1883, a settlement was made between these sub-contractors and the Toledo, Cincinnati and St. Louis Railroad Company,

by virtue of which the Railroad Company delivered its notes to H. S. Hopkins & Co. for the amount agreed upon.

The question, therefore, is, whether these notes can be considered as a lien upon the property superior to the first mortgage bonds.

The next proposition is, whether the fact that the stock of the Frankfort and State Line Railroad Company, which was put up as collateral security for the payment of the notes, has any bearing upon the legal status of the notes or upon the lien of the notes, the fact being that this stock of the Frankfort and State Line Company represented nothing, but was absolutely without value, the fact being that the line of road which this stock purported to cover had been built by the Toledo, Cincinnati and St. Louis Railroad Company, paid for by its bonds, and a mortgage executed on the 23d of July, 1881, covering that entire line.

Another fact should be taken into consideration, and that is, that the line of road actually built was a different line from the one originally contemplated by the Frankfort and State Line Railroad Company; a line located, not by the Frankfort and State Line Company, but by the Toledo, Cincinnati and St. Louis.

Mr. Grouthusen (Record, page 485) was familiar with the contractors' accounts; he was present in March, 1883, when the construction accounts of the T., C. & St. L. Railroad Co. were audited and examined. At the same time he had the books of Daniel Ahl & Co. and went through every voucher of the company connected with the construction of the road, whether issued by the Western Construction Company or under Mr. Craig's or under Mr. Ahl's administration. All the vouchers during the administration of each and all (Record, page 487). The books of Daniel Ahl & Co. were put in the possession of the witness for examination. The witness

could not state whether Hopkins himself was present, but some one was present who represented the claim of H. S. Hopkins & Co.; that at that time no amount was agreed upon (Record, page 493), on the ground that the claim was fraudulent. The witness states (same page) that Daniel Ahl objected to Mr. Hyde or anybody else settling with H. S. Hopkins & Co., on the ground of fraud. Hopkins & Co. claimed at that time $35,000 or $36,000, or at least between $35,000 and $40,000, and there was no settlement made at that time.

It is clear from the evidence of this witness that the claim was too large and was declared to be fraudulent by those who knew all the circumstances of the claim.

On Record, page 499, is a list of all the checks given to Hopkins & Co., showing that the certificates never should have been issued for the amount ordered, even if their lien had been in fact paramount to that of the mortgage.

2d. The claim of Cochran & Brown.

This claim arises on a contract made on the 14th day of June, 1881, between Cochran & Brown and the Charleston, Neoga and St. Louis Railroad, which afterwards became a part of the T. C. & St. L. between Charleston and Ramsey, Illinois. The work was completed in October, 1882, more than fifteen months after the making and recording of the Toledo, Cincinnati and St. Louis mortgage. A notice of lien was given the 15th of November 1882, but there is no evidence to show that it was ever served, or that any suit to enforce a lien was ever instituted; but there was an agreement to dismiss the suit (which was never commenced), and this agreement was dated March, 1883, but Cochran & Brown settled with the Toledo, Cincinnati and St Louis Railroad, and took its notes, and if and if it had any lien, waived it.

So that exactly the same questions arise in this claim as in the claim of H. S. Hopkins & Co., the circumstances being substantially the same and the facts with regard to the settlement, the making and recording of the mortgage and giving of the notes by the Railroad Company being exactly the same.

Grouthusen, the witness familiar with the books of Daniel Ahl, Jr., and of the railroad company, and with the accounts of the contractors and subcontractors, swears (page 497) that Cochran & Brown were entitled to a credit or had a credit in 1883 on the books for $16,938.45. He states that it is his impression there was a settlement between Ahl and Messrs. Cochran & Brown and Hyde; an amicable settlement; and that Cochran & Brown took the personal notes of Mr. Hyde, and that to the best of the witness' recollection these notes were taken for about fifty cents on the dollar of the claim, and was done in March or April, 1883 (Record, page 498), and yet certificates were issued to Cochran & Brown, although they had taken the notes of Henry Hyde and had made a settlement.

3d. The claim of Beeson & Hammond.

This claim is upon three contracts made in April and July, 1882, for grading and laying track between Remsey and New Douglas, Illinois. The work began in April, 1882 and terminated in 1883. This work commenced more than fourteen months after the making and recording of the Toledo, Cincinnati and St. Louis mortgage. In this case there is no evidence to show that any lien notice was filed or served or any suit instituted, although there is some oral testimony that some legal proceedings were commenced, and a letter was produced from the counsel of the Railroad Company showing the pendency of these proceedings in March, 1883, but it was claimed that the records of the Court had been lost. A certificate of the Court was filed showing that no lien

notices or claims were ever filed or served. In this case the contracts were made and executed after the mortgageof the T., C. & St L. was executed and recorded. In all other respects the facts are exactly the same as in the two preceding cases; there was a settlement by note.

The witness Growthusen (Record, page 494) swears that Beeson & Hammond had no contract with the Western Construction Co., but they had a contract with Daniel Ahl. The original claim of Beeson & Hammond was about $13,000 or $14,000 (Record, page 494), and they had received a draft for $10,000, for which they had given no credit; there was a dispute about this, and it was shown that Beeson & Hammond had received the money, and it was finally admitted by Beeson & Hammond that they had received the $10,000 draft and that there remained due to Beeson & Hammond, in the spring of 1883, only $2,889.35, and yet there was issued to them certificates for $10,626.14, and no work was done after that time.

In regard to the $10,000 refunded (Record, page 500) in January, 1883, there was paid by Major Harding to Beeson & Hammond $10,000 by check on the LaClede Bank, leaving only $2,889.35 due, and on the same page will be found all the vouchers to Beeson & Hammond, all showing exactly the amount due, and the witness swears that he knows the account is correct; that he is positive.

4th. The claim of Patrick Dowling.

This claim arises out of three contracts made in May, June and October, 1881, for grading between Charleston and Neoga, Illinois; between Neoga and Cowden, Illinois, and for track laying between Neoga and Charleston. In October, 1882, he filed a claim for extra compensation for damages arising out of detention in the work. There is some oral testimony to show that legal proceedings to per-

fect the lien were instituted at Toledo, Illinois, but the records and Court House were burned. All of this work was done after the mortgage was made and recorded. It also appears that the certificates issued to Patrick Dowling were for construction work done after the making and recording of the Toledo, Cincinnati and St. Louis mortgage not only, but there is no satisfactory evidence in the record that Patrick Dowling ever perfected that lien or ever filed any notice or commenced any proceedings for the purpose of subjecting any portion of the property to the payment of his claim. In addition to this, the books of the Construction Company show not only that nothing was due him, but that in fact he had been overpaid. The vouchers and papers on file show that nothing was due Dowling, and the evidence is beyond dispute that he had no lien whatever, the claim really being for damages resulting from a breach of contract on the part of the Construction Company, not for materials furnished; not for work done; not for anything for which the statute of any State allows a lien, but a claim for damages arising from a breach of contract on the part of the Construction Company.

The testimony (page 498) is that Dowling presented a voucher for work amounting to $23,961.31 and was paid that amount, whereas the work really done by him amounted to $19,821.05. Mr. Growthusen, the witness, also swears that there is no voucher in any of the books for $23,961.31 for work or material. From this testimony it appears that Dowling was indebted to the contractors.

5th. The claim of Kapp & Co.

This was for a contract to furnish ties to the Western Construction Company during the year 1882, closing about November 3, 1882, all of which was done after the mortgage was executed and recorded. The Master reported that the ties

were afterwards sent by the Receiver and used on the Dayton and Southeastern Division, Ohio. This, however, is a mistake. All of these ties were used by the Western Construction Company (see Record, page 136).

6th. The claim of the Iowa Construction Company.

The original contract was made on the 22d of February, 1881, between Barnes & Co. and the Western Construction Company, and was assigned to the Iowa Construction Company by Barnes & Co. The contract was for building the part of the road from Clark's Hill, Indiana, to State line, and 20 miles southwest in Illinois, 55 miles of the line being in Indiana and 10 miles in Illinois. The work was begun in the spring of 1881 and finished on the 3d of February, 1882. Money was paid from time to time as the work progressed, and the work amounted in all to $170,839.83, for which there was paid from time to time $144,201.45, and afterwards $5,000, leaving due $21,638.38. All of the work for which the $21,638.38 were due was done long after the mortgage was made and recorded, and was done for the Western Construction Company. An arbitration was, however, afterwards had, and the total sum was increased to $40,706.24, and afterwards this was reduced by compromises and payments, and the amount finally settled upon was $33,750. It was conceded at the trial that about nine-tenths of the work was done in Indiana, and only one-tenth in Illinois. At that time there was no law in Indiana by which a subcontractor could file a lien upon the property, consequently the Iowa Construction Company sought to file and perfect its lien in the State of Illinois, not for the work done in Illinois only, but for the whole work, including the work done in Indiana. The lien was filed on the 24th of February, 1882, and a copy of the

notice mailed to the President of the company, so that in this case there could not have been any lien except for the work done in Illinois, which was only about one-tenth of the amount. Yet the Iowa Construction Company sought to perfect a lien in Illinois for the work done in Indiana, only one-tenth of the work having been done in Illinois and nine-tenths in the State of Indiana, where the law gave no lien. This company settled with the Toledo, Cincinnati and St. Louis Railroad Company and took its notes, and if it had any lien in Illinois, waived it by the acceptance of the notes, and yet Receiver's certificates were given to the Iowa Construction Company as though that company had a lien upon the property. In all other respects this claim is the same as that of Hopkins & Co., Cochran & Brown and the others mentioned.

7th. The claim of Henry McPherson.

This claim grew out of a contract made July 21, 1881, with the Western Construction Company to build a portion of the line in the State of Illinois. The work terminated on the 31st of August, 1882. A lien notice was filed on the 20th of September, 1882, and suit was instituted on the 31st of January, 1883. This claim was not included in the pretended trust agreement of March, 1883, and consequently McPherson began proceedings on his own account, which resulted in the Court authorizing the Receiver to issue certificates to him to the amount of $20,000. The decree recites that the parties were present and consented, but the testimony of counsel, John M. Butler, was offered that, in endorsing on the back of the entry "O. K.," he only meant that the decree was satisfactory in form, and was drawn in accordance with the decision of the Court, but did not intend, and did not as matter of fact agree to the issuing of the certificates. There is no difference between this claim and the

others; it was for construction work, the amount was due from the Western Construction Company, and should have been paid by that company, as that company had received the entire consideration. The evidence also shows that John M. Butler was not present at the hearing, and consequently never admitted that anything was proper except that the form of the order was in accordance with decision of the Court.

It also appears in the claim of Henry McPherson that the balances shown due by the statements for June and July were added together, making an error of $10,241.30. The balances claimed to have been due McPherson and McPherson, Neeley & Co. were put together, and the total estimates did not amount to more than $23,091,52. But, in adding together the balances claimed on the June and July estimates, the first being $10,246.30 and the second, $15,008.01, they were made to foot up $36,462.77, an error of $11,213.46. McPherson avers in his petition that he had had an accounting under his contract on January 29, 1883, and that before that time he had filed his petition to enforce his lien. But the very petition in which he makes the averment that he had filed that petition before the 29th of January, 1883, was in fact filed January 31, 1883, two days afterwards. The evidence also shows that the contract with McPherson was made after the filing and recording of the Toledo, Cincinnati and St. Louis mortgage in Illinois, and that he had notice of the mortgage.

The witness Growthusen (Record, pages 494–5) states the account of Henry McPherson. From this it appears that McPherson had been overpaid by Daniel Ahl, and the cash book of Daniel Ahl showed that Henry McPherson had turned back in the treasury of the construction agent $10,000 paid in excess of previous payments; that he in fact Refunded $10,000. This is shown by one of the books

that they were endeavoring to hide, and yet receiver's certificates were issued to Henry McPherson for $20,000 and interest (Record, page 152). On page 497 of the Record the witness swears that McPherson, Neely & Co. were indebted to Daniel Ahl, that is, the contractor, in the sum of $451.61.

8th. The claim of Richie & Co.

This claim is based on an account for lumber and ties sold and delivered between April 11, 1881, and July 20, 1882. It was not included in Schedule B of the Trust Agreement of March 20, 1883, but subsequently an intervening petition was filed in this case upon the claim, and after notice to all of the parties testimony was taken before a master and the same presented and fully considered by the Court. Testimony was taken concerning the claim tending to show that the claim was partly paid, and that the ties delivered were used on other divisions of the road. Notwithstanding the Court allowed the claim in full and ordered that it be placed upon Scheduld B, with all the rights and equities allowed by the orders of January 29, 1884, and allowed the Receiver to issue certificates for the same. The account books of Daniel Ahl & Co., in which Richie & Co. were credited with all work done and charged with payments made, shows that there was due to Richie & Co. $1,138.90, and no more (Record, page 489).

APPELLANT'S POINTS.

I.

Under the facts in this case we claim that the Receiver's certificates involved in this appeal were issued without consideration, and are invalid and void as against the first mortgage bondholders.

FIRST.—Because it appears from the testimony that the certificates were issued by the Court under a misapprehension as to the real facts, and that the Court was induced to issue the certificates by misstatements and suppressions of the circumstances. That by these misrepresentations the Court was deceived and misled and made to believe that the issuing of the certificates was necessary for the protection of the holders of the Toledo, Cincinnati and St. Louis bonds. That the certificates were necessary for the preservation of the title to about sixty-seven miles of the line covered by the mortgage, and that unless the Receiver's certificates were issued the title to some sixty-seven miles of the line would be lost. In fact, the $1,800,000 par value of the Frankfort and State Line Railroad Company stock constituted no lien whatever, neither at law nor in equity, on the railroad and property of the Toledo, Cincinnati and St. Louis Railroad Company covered by its first mortgage. That as a matter of fact the Frankfort and State Line Railroad Company constructed no line of road, and the contract made between the Frankfort and State Line Railroad Company and the Western Construction Company was never carried out by the Western Construction Company, nor was it insisted upon by the Frankfort and State Line Railroad Company. After that contract was made the Western Construction Company made another contract for constructing a road between the same

points, or one, rather, that included the same points. This contract was made with the Toledo, Cincinnati and St. Louis Railroad Company, and under the last mentioned contract the road was constructed, with the knowledge and consent or acquiescence of the Frankfort and State Line Railroad Company. The evidence also shows that the President of the Toledo, Cincinnati and St. Louis Railroad Company dictated who should be directors in the Frankfort and State Line Company; that the old Board went out; that a new Board was selected, and that the only reason for keeping the Frankfort and State Line Railroad Company alive was for the purpose of collecting certain local aid that had been voted by various townships through which the line was built. The evidence also shows that much of this local aid was collected by the Western Construction Company, and appropriated to its own use long after it had received all the bonds and stock of the Toledo, Cincinnati and St. Louis Railroad Company, to which it was entitled for the construction of the line.

It would have been impossible for the Frankfort and State Line Railroad Company to have enforced any lien of any sort or kind against this property, and consequently the stock of the Frankfort and State Line Railroad Company, held by the Western Construction Company, constituted no lien upon the property, and when this stock was handed over to the Toledo, Cincinnati and St. Louis Railroad Company, that was a settlement of the entire claim. The title, at that time, was not in the Frankfort and State Line Railroad Company, nor in any of its stockholders. The equitable title and the legal title were in the Toledo, Cincinnati and St. Louis Railroad Company, and consequently the property belonged to the first mortgage bondholders.

SECOND.—We contend that the claims of H. S. Hopkins & Co., Cochran & Brown, Beeson & Ham-

mond, Patrick Dowling, Kapp & Co., The Iowa Construction Company, Henry McPherson and Richie & Co. were construction debts; that the amounts, even if due, were the debts of the Western Construction Company, and not of the railroad company. Not one of these debts was contracted by the Toledo, Cincinnati and St. Louis Railroad Company; not one of them constituted, or could constitute any lien whatever at law or in equity upon the railroad property of the T., C. & St. L. Co.

The Toledo, Cincinnati and St. Louis Railroad Company, on the 23d day of July, 1881, executed and delivered its mortgage covering the entire line, for the purpose of securing $6,000,000. All the work done by these sub-contractors, for which any claim was made, was done after the execution and recording of that mortgage. Consequently these claims could not be a prior lien upon the road.

In some of the cases, the sub contractors took the notes of Henry Hyde and others, and afterwards took the notes of the Railroad Company, abandoning all liens, if they had any, and waiving all priority, even if such priority existed.

The most and the best that can be said of the transaction is that the Toledo, Cincinnati and St. Louis Railroad Company voluntarily assumed the debts of the Western Construction Company, after having paid the Western Construction Company all that was due that company under its contract.

In order to give color to this fraudulent transaction, the Toledo, Cincinnati and St. Louis Railroad Company deposited as security for the notes thus given by the company to the sub-contractors, the stock of the Frankfort and State Line Railroad Company. But as that stock represented nothing and was issued without any consideration, and as the Frankfort and State Line Railroad Company never built the road and never paid for the road, such

stock was no lien, and the holders of that stock had no title, either at law or in equity, to the railroad that had been built and paid for by the Toledo, Cincinnati and St. Louis Railroad Company.

II.

These certificates, according to the evidence, were improvidently issued; issued under a misapprehension of the fact; issued because the Court was deceived, and consequently are void as against the first mortgage bondholders, and cannot either at law or in equity constitute a lien upon the railroad and property prior and superior to the lien of the bonds secured by the first mortgage.

The debts for which these certificates issued were construction debts, and such debts were not secured by any mechanics', builders' or laborers' liens duly perfected under and pursuant to either the laws of Indiana or Illinois, in which States the said alleged debts for construction purport to have been contracted.

All of the work was done for the Western Construction Company, said company having made a contract with the Toledo, Cincinnati and St. Louis Railroad Company.

Under these circumstances how could a holder of the stock of the Frankfort and State Line have any ownership in a road built by another company and paid for by another company?

If the stock of the company that built and paid for the line, and if the bonds of that company that were sold, the proceeds of which were used in building the line, are no lien, how can the stock of a company that did not build the line and had no

interest in it and never paid one dollar towards its construction, be a lien superior to the first mortgage bonds, issued by the company that constructed and paid for the road?

III.

These certificates, or a large part of them, as hereinbefore stated, are invalid and void because the alleged construction debts and claims upon which they are based and to pay which they were issued, are fictitious, fraudulent and unjust; in some cases issued where nothing was due, and in every case issued for a greater amount than was due.

IV.

It is claimed by appellant that the certificates are not in any sense commercial paper, not negotiable, and that the same defenses are available that would be were all the certificates held by the persons to whom they were first issued.

And in this case, as the appellant represents not only himself but the first mortgage bondholders, for whom and in whose interest the road was purchased at the foreclosure sale, and to whom, in the decree of the Court, was given the right of appeal, he has the right, in such representative capacity, to contest the validity of these Receiver's certificates. Were he simply a purchaser of the property, representing only himself, he would not have the right to contest the validity of these certificates. But he represents the first mortgage bondholders, the owners of the

fund, not only, but the holders of securities prior in lien to these certificates.

Under these circumstances, we claim that he has the right to contest the validity of the Receiver's certificates not only, but that the same are not in any sense negotiable.

Union Trust Company *vs.* Chicago and Lake Huron Railway Co., 7 Fed. Rep., 513. Opinion by Judge Brown.

Turner *vs.* P. & S. R. W. Co., 95 Ills., 135.

Stanton *vs.* A. & C. R. R. Co., 2 Woods, 506.

Same *vs.* Same, 31 Fed. Rep., 585.

Central National Bank *vs.* Hazard, 30 Fed. Rep., 484.

See also

Beach on Receivers, Sec. 396.

We therefore insist that the certificates were issued under a misconception of the facts; that they were given in payment of construction debts—debts due by the Western Construction Company and not by the railroad company; that the debts for which they were given were not a prior lien to the bonds; that the Frankfort and State Line Railroad Company built no line, issued no bonds, and that its stockholders had no claim upon the road; that the stock of the Frankfort and State Line Company was of no value, and that the certificates should be set aside and the judgment of the Court below reversed.

ROBERT G. INGERSOLL,
JOHN M. BULLER,
Counsel for Appellant.

Office Supreme Court U. S.
FILED,
OCT 14 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

NO. 39.

SYLVESTER H. KNEELAND,
Appellant,

vs.

C. L. LUCE & CO. AND JOHN T. NEWTON, ET AL.
Appellees.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES.

CHARLES PRATT,
Of Counsel.

BARKDULL PRINTING HOUSE, TOLEDO, O.

SUPREME COURT OF THE UNITED STATES.

SYLVESTER H. KNEELAND, *Appellant*,

vs.

C. L. LUCE & CO., JOHN T. NEWTON, *et al.*,
Appellees.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES.

FIRST.

Mr. Kneeland, the appellant, had no right of appeal to this court from the decree of Circuit Court here in question.

1. The decree here sought to be reviewed was rendered by the Circuit Court of the District of Indiana, confirming a report made by A. J. Ricks, Esq., as Special Master, as to certain receiver's certificates issued in the foreclosure proceedings against The Toledo, Cincinnati and St. Louis Railroad Company, which have so many times been before this court, finding the amounts due on the certificates, (see pages 158-160 of printed record), and ordering as follows, (page 160):

> "Wherefore it is now ordered by the court, that the purchaser of the said St. Louis Division of the

said Toledo, Cincinnati and St. Louis Railroad, within thirty days from the entry hereof, pay into the registry of this court each and all the said several sums so above found due to each of the avove named owners and holders of said certificates, and also said sums so due on said certificates the ownership of which is not determined, with interest upon each of the said sums from September 15th, 1887, at the rate of six per cent. per annum; the aggregate amount so to be paid by said purchaser being said sum of $172,681.44, with interest at six per cent. per annum from September 15th, 1887, and that thereupon the amounts so respectively due to each of said parties shall be paid over to them or to their attorneys, upon the surrender by them to the clerk of this court, of their said respective certificates by them so held, and said clerk thereupon shall cancel such surrendered certificates. And in case of failure of said purchaser to make payment of said sums, or either of them, within the time above limited, such payment shall be enforced in accordance with the provisions of the former decrees of this court, upon the demand of the owner and holder of any one or more of the said certificates."

2. This decree was rendered September 16th, 1887, and this appeal by Kneeland was from *that decree alone.* The appeal taken was as follows, (page 161):

"And now comes Sylvester H. Kneeland as purchaser of the railway property sold at foreclosure sale under final decree rendered in said above named consolidated cause, and as trustee and representative of the holders of the first mortgage bonds secured by the mortgage foreclosed by said final

decree rendered in said above named consolidated cause, and objects to said above final decree and order of payment, and prays an appeal therefrom to the Supreme Court of the United States, which appeal is now granted upon said Kneeland's giving bond for costs to the approval of the court, in the sum of ten thousand dollars, or a supersedeas bond to the approval of this court, in the sum of two hundred and forty thousand dollars."

3. The decree under which Mr. Kneeland, the appellant, purchased, was rendered in the Circuit Court of the District of Indiana on the 12th of November, 1885. (Page 100). This decree, in addition to the requirement of a cash deposit of $50,000 at the time of making the bid, contains this provision, (page 109):

"It is further ordered, adjudged and decreed, that within twenty days from and after confirmation of such sale, the purchaser or purchasers shall pay of the unpaid purshase money a sum sufficient, together with said deposit of fifty thousand dollars, to pay and discharge the court costs, the master's fees, solicitor's and counsel fees, and the claims and debts, including taxes legally due on the property, *which shall have been then found and finally adjudged to be due and payable as court and receiver's indebtedness, and to be paramount in equity to the lien of said indenture of trust or mortgage herein decreed to be foreclosed, excepting such final decrees for the payment of moneys out of said fund as may have been superseded by and upon proper appeal*, and upon such payment by such purchaser or purchasers, he or they shall be let into the possession, use, and enjoyment of the said railroad

and property, subject to the conditions and stipulations hereinafter contained."

4. The receiver's certificates ordered to be paid by the decree of September 16th, 1887, here in question, constituted a part of the "*receiver's indebtedness*" outstanding at the time of this decree and order of sale of November 12th, 1885. They had all been issued under and in pursuance of orders and decrees of the Circuit Court made prior to the decree of sale, and all of which were then in full force, never having been "superceded" by appeal, writ of error or review.

There were three of these decrees.

a. A decree made by the Circuit Court on the 29th of January, 1884, ordering the Receiver Craig to issue to sundry creditors in payment of certain specified amounts, claimed by these creditors to be liens upon the railway property prior to the general mortgage. (Pages 23 and 24.)

The receiver, by this decree, was ordered to issue the certificates upon the release and discharge of the claims of these creditors, and specific provisions were made in the decree as to the form of these bonds, and making them when issued, liens upon that part of the railway between Kokomo, in the state of Indiana, and East St. Louis in the state of Illinois, *prior* to the mortgage indebtedness. (Page 24.)

This decree was rendered upon a petition filed by Mr. Dwight, the first receiver who took charge of this railroad, but not heard until after the appointment of Mr. Craig as receiver.

This petition (pages 13 to 21), was filed for the purpose of obtaining an injunction to restrain these credit-

ors from enforcing mechanics' liens against the road, or portions of it, and also from selling, through their trustee, the American Loan and Trust Company, $1,-800,000 of the stock of the Frankfort and State Line Railroad Company, organized for the purpose of constructing a certain portion of the road known as the Frankfort and State Line Railroad, which formed a part, and the connecting link of about (60) miles of the line of road between Kokomo and East St. Louis, but which had never been consolidated with the other companies forming that line. The Toledo, Cincinnati and St. Louis Railroad Company, the mortgagor, had no legal title to this sixty miles of road, but claimed to have an equitable title to the same.

This petition brought before the court fully and clearly the then situation of the property in the receiver's hands, the respective claims of the creditors and the bondholders, and the reasons for asking the intervention of the court to prevent the sale of the stock held by the American Loan and Trust Company in trust for the creditors, and prayed that the parties might appear and set forth their claims, that such order might be made as equity might require, and that the threatened sale might be enjoined.

Hearing was had before the court, and the decree, prepared under the supervision of Judge Drummond, finds, (page 23):

> "This day came on to be heard the petition of the receiver regarding the Frankfort and State Line Railroad stocks, and all of said parties and all of said creditors named in Schedule B of said receiver's petition appeared in open court in person or by attorney; and thereupon it appears to the

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> "This day came on to be heard the petition of the receiver regarding the Frankfort and State Line Railroad stocks, and all of said parties and all of said creditors named in Schedule B of said receiver's petition appeared in open court in person or by attorney; and thereupon it appears to the

court, and the court finds, that the facts set forth and represented in said petition are true, and that it would be injurious to the interests of the stockholders, bondholders, and creditors of the said Toledo, Cincinnati and St. Louis Railroad Company, and more especially to the bondholders of said portion thereof between Kokomo and St. Louis, and to the interests of the public, so far as interested therein, that the said stock, the legal title to said portion of railroad between Frankfort and Illinois, and possibly the right to the possession of the same should be sold and the connection and continuity of said line destroyed; and that it is desirable and necessary for the protection of the rights of all of said parties, and particularly the rights and interests of the holders of bonds secured by mortgage of said portion of said railroad between Kokomo, Indiana, and East St. Louis, that the court should authorize the issue of receiver's certificates in that manner for the purpose and on the condition hereinafter set forth."

And orders, (pages 23 and 24):

"It is therefore hereby ordered and decreed by this court that William J. Craig, receiver herein, issue and deliver to each of said creditors specified in said Schedule "B" the respective amounts due to them and so secured, to wit:

"To H. S. Hopkins & Co.	$30,475 13
Cochran & Brown	20,061 66
Kapp & Co.	1,731 98
Iowa Construction Co.	33,750 00
Patrick Dowling	3,375 00
Beeson & Hammond	11,626 14

"For which amounts certificates shall respectively issue bearing interest from April 3rd, 1883, at six per cent. per annum. *The indebtedness evidenced by said certificates is hereby made a first and best lien on all of said railroad lying between the city of Kokomo, in Indiana, and East St. Louis, in Illinois.* Said certificates shall bear date of their issue, shall be payable on or before one year thereafter, bearing six per cent. interest thereon as aforesaid, and payable semi-annually, and shall be in the following form:"—[Then follows the form in which they are to be issued.]

No appeal was ever taken from this decree.

b. During the pendency of the above-named petition, W. F. Ritchie filed his intervening petition (page 22), claiming that he was a creditor to a certain amount with the same rights and equities as those named in Schedule B, and asking to be placed in the same position.

His claim was disputed, and all questions arising in reference to it expressly reserved in the decree of January 29th. (Pages 24 and 25). Testimony was taken as to the correctness of this claim before H. W. Bishop, Master at Chicago, which is contained in the record, pages 163 to 216, and on the 6th of March, 1884, (page 29), upon a hearing had before Judge Drummond on the 4th, after reciting the reservation in the January decree, the court finds and decrees as follows:

"And the said W. F. Ritchie & Co. having submitted their said cross-petition, together with evidence and proofs in support of the same, to the court, and the court, being duly advised in relation thereto and having fully considered the same, finds

that the facts set forth and represented in said cross-petition are true, and that said claim should be placed in Schedule "B," referred to in said order.

"It is therefore hereby ordered, adjudged and decreed by this court, that said claim of William F. Ritchie be allowed at the sum of twelve thousand nine hundred and twenty-one and $\frac{98}{100}$ (12,921.-98) dollars, together with interest thereon, at the rate of six per cent. per annum from July 20th, 1882, and said claim so allowed be placed upon Schedule "B" of said agreement, with all the rights and equities allowed by the order heretofore granted to the creditors in said schedule and referred to in the order aforesaid, dated the 29th day of January, 1884."

And on page 30 of the record the issuing of the certificates is ordered.

"It is further ordered, adjudged and decreed by the court that William J. Craig, receiver of the Toledo, Cincinnati and St. Louis Railroad Company, issue and deliver to said William F. Ritchie receiver's certificates for the amount so due to said Ritchie as a creditor specified in Schedule "B" and so secured as specified in said trust agreement; said issue to be of certificates of said receiver for aforesaid amount of $12,921.98, bearing interest from the 20th day of July, 1882, at six per cent. per annum.

"The indebtedness evidenced by said certificates is hereby made *a first and best lien, together with the amounts named in the aforesaid order to the other creditors named in Schedule "B" of said trust*

agreement, on all of said railroad lying between the city of Kokomo, in Indiana, and East St. Louis, in Illinois. Said certificates shall be dated at the date of their issue, shall be payable on or before one year thereafter, bearing six per cent. interest thereon as aforesaid, and payable semi-annually, and shall be in the following form:"—[Specifying the form.]

No appeal was ever taken from this decree.

c. After these decrees had been entered, Henry McPherson filed his intervening petition. (Pages 33 and 34.) In this it is claimed that McPherson is a creditor having a claim of the same character as those provided for by the above decrees, and entitled to participate in the same trust agreement; that the amount due him was $20,000, and praying for the issue of like certificates.

This petition was heard before W. P. Fishback, Master, and the report made by him is found in the record, page 65 and following. This report was accompanied by the testimony produced before him, page 68 and following. To this report exceptions were filed by the Central Trust Company, Trustee, (pages 84 and 85), and on the 26th of March, 1885, on hearing had (page 91) at which the Central Trust Company, the trustee for the bondholders, were represented by Col. A. W. Hendricks, and the bondholders' committee, James M. Quigley and others, who had become parties to the suit on their own application, were represented by Mr. John M. Butler, and Mr. McPherson and the receivers were also present or represented, the decree of the court was rendered.

The court on such hearing decreed, (page 92):

"And the court now being sufficiently advised

as to the exceptions of the defendant to the report of the master upon said McPherson's intervening petition, and having fully considered the same, it is ordered, adjudged and decreed that said exceptions be, and the same hereby overruled, and said master's report be, and the same is, in all things confirmed.

"And said petition of the receiver being heard and the court being fully advised of and concerning the same, it is ordered, adjudged and decreed, *the parties present consenting*, that William J. Craig, receiver of the Toledo, Cincinnati and St. Louis Railroad Company, issue and deliver to Henry McPherson receiver's certificates for amount of the several notes issued to him and described in his said intervening petition; which said certificates shall bear interest from the 29th day of January, 1883, at six per cent. per annum.

"The indebtedness evidenced by said certificates is hereby made a *first and best lien* on all of said Toledo, Cincinnati and St. Louis Railroad Company lying between the city of Frankfort, in Indiana, and East St. Louis, in Illinois. Said certificates shall bear date of their issue, and shall be payable on or before June 1st, 1886, bearing six per cent. interest thereon as aforesaid, and shall be in the following form:"—[Specifying.]

No appeal was ever taken from this decree.

These decrees were entered in the Circuit Court of the Southern District of Illinois, as well as in the District of Indiana, and the certificates issued in each case in strict compliance with the orders of the court.

My position is, that upon these facts as to which there can be no dispute, there is in this case no right of appeal by Kneeland, from the decree of September 16th, 1887, ordering the payment of the certificates issued under these several prior decrees of the court.

The facts under which Mr. Kneeland was held to have a right of appeal in the car-rental cases—Kneeland vs. American Loan and Trust Company, 136 U. S., 89—were essentially different from the facts in the case at bar.

There, although the amount due on the car-rentals had been a long time in contention, it was still unsettled and pending before a master at the time of the foreclosure decree. There was at the time of the sale no means by which bidders could ascertain the amount which would be required to pay these car-rentals. The report of the master upon the rentals seems from the statement by the court (page 92), to have been made about February 23rd, 1886. This report being a determination made after Mr. Kneeland's purchase, he had the right to be heard upon the question of its confirmation by the court.

The holding of this court that Mr. Kneeland had the right under such a state of facts to be heard both in the trial and appellate courts, does not sustain his right to be heard in this court under the facts in the case at bar. On the other hand it is submitted that the principles as stated, the language used and the authorities cited in the opinion of the court by Mr. Justice Brewer, sustain the position that Mr. Kneeland has no right to *relitigate any question which was determined by either decrees under which the certificates in question were issued.* Both as a purchaser under the decree of sale, and as a representative of the bondholders, he is con-

ants under the sixth paragraph of the decree, and what were the amounts due to them severally. The first and only decree from which Porter could appeal, in respect of the claims of these appellees, was the decree of October 9, 1886."

It will be seen from this, that the decree as to which the question was there made, that of February 16, 1886, was the exact converse in all the important and determining essentials of a final appealable decree, to each of the three several decrees here in question.

Each of these three decrees *did* determine the amount of the respective claims due to each of the several claimants, *did* determine who these claimants were, and also the rights of these respective claimants as against all parties to the action.

Following this case, however, and directly in point here, is the case of *Farmers' Loan and Trust Company, 129 United States, 206.*

Counsel there opposing the relators' petition as appears from the abstract published in the report, made a very elaborate argument upon the proposition that the order for the issuing of certificates in that case was not a final order, and that the court below therefore properly refused to allow the appeal.

This court, however, granting the importance of the question, holds the position not well taken.

Referring to the argument made by counsel before it, that upon the final sale and order of distribution of the court, the certificates issued would not necessarily be held to have priority over the mortgage indebtedness. Mr. Justice Miller, in delivering the opinion of the court (page 214), says:

"It is one of the arguments used before us, that upon a final sale and an order for the distribution of its proceeds, such certificates would not necessarily have such priority; but that *issued under this order, and containing on their face the provision authorized by it, they would constitute a first lien upon the property of the railway company to be sold under the final decree, is, we think, very clear.* Such order standing unrepealed, we do not think that the court in a subsequent stage of the same litigation, in the same case and in regard to the same subject matter, could be permitted to say that the holders of these certificates must establish their right to priority of payment; *but we are of the opinion that such holders, under the decree of this court that they should have priority standing unreversed, would be entitled to such first lien.*"

And further on, on page 215:

"This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in this property."

Each of the three decress here in question comes directly within the language used in relation to the decree there in question.

Each of these decrees provides expressly that the certificates to be issued should be a lien upon the railway property, prior to the bonds secured by the mortgage. And this provision appears upon the bonds which were issued and delivered under the authority of the decrees to the creditors named therein, and by them put upon

the market, and purchased by the present holders upon the faith and credit of such decrees.

But for the credit thus given them they would never have been accepted by these creditors, or if accepted would not have been available to them, as the present holders would never have purchased them upon any uncertainty as to their priority of lien.

The Central Trust Company vs. Grant Locomotive Works, 135 United States, page 207.

The remarks in the opinion of the court by the chief justice (pages 223, 224, etc.), as to the finality of the order in that case of December 22d, 1883, and the power of the court at a subsequent term to set it aside "of its own motion," and the decisions there cited, apply to the orders of January, 1884, and the Ritchie and McPherson decrees; and the holding there that Mr. Kneeland could not, by appealing from the order of January 28th, 1889, bring before this court, for revision, either the order of December 22, 1883, or that of June 11, 1887, is directly in point. (See page 226.)

It is the same thing to say here that by appeal from the decree of September 16th, 1887, neither of the decrees of January 29th or March 6th, 1884, or March 26th, 1885, can be brought before this court for revision.

The case at bar is in fact wholly clear of the difficulties presented there; no attempt having been made, either by the bondholders, their trustees, The Central Trust Company, or Mr. Kneeland as purchaser, by appeal, bill of review, motion or otherwise, to set aside, reverse, or in any way attack either of these three original decrees.

SECOND.

Mr. Kneeland, both as purchaser and as representative of the bondholders, is estopped and concluded by the record from contesting or questioning the certificates or the priority of lien under the same, issued under either of the three several orders and decrees providing for their issue.

This will appear by reviewing and stating a little more fully some parts of the record already referred to under the preceeding points.

The petition filed by the receiver to enjoin the sale of the $1,800,000 Frankfort and State Line Railroad stock is found in the record, page 13 and following, and has already been referred to. It states the organization of that company for the purpose of constructing the sixty miles of road between Frankfort, Indiana, and the state line between Indiana and Illinois — the making contract for construction with the Western Construction Company, and the compliance with the contracts on the part of the construction company—that the intention was to make this sixty miles a part of the line of the Toledo, Cincinnati and St. Louis Railroad Company, and that the construction company also had contracts with that company to complete the line through to East St. Louis.

The consideration for the construction of the sixty miles was to be the delivery of paid-up certificates of the capital stock, except such as should be due to third parties for local aid, and first mortgage bonds, at the rate of $10,000 per mile. That mortgage was never executed, but the Toledo, Cincinnati and St. Louis Railroad Company had executed the mortgage, purporting to cover the whole line from Kokomo to East St. Louis, of which this sixty miles was a part, and had for some

months been in possession of this part, and that it had with the remainder of the line passed into possession of the receiver.

The petition then alleges:

> "Said receiver represents that in the construction of said railroad extending from Kokomo to said Illinois line, and in the construction of said further portion of said road extending to East St. Louis, being all and only that line of railroad covered by said Toledo, Cincinnati and St. Louis Railroad mortgage, certain indebtedness remained due to certain contractors for materials furnished or labor done thereon, for which said contractors had or claimed certain liens, and had begun or were about commencing suits thereon against said Toledo, Cincinnati and St. Louis Railroad Company, and said capital stock of said Frankfort and State Line Railroad Company being held and reserved back for the payment thereof, so far as said Western Construction Company was liable thereon, all of said parties in interest, to-wit, the Toledo, Cincinnati and St. Louis Railroad Company, principal defendant herein, party of the first part, and said Frankfort and State Line Railroad Company, party of the second part, and said Western Construction Company, party of the third part, and the American Loan and Trust Company of Boston, a corporation organized under the laws of the State of Massachusetts, party of the fourth part, and certain of said contractors as did sign the same on their respective parts, did, for valuable and sufficient consideration, duly make and execute the following agreement:"

This agreement, set out in full on pages 15-17 of the

tion of said railroad between Frankfort and Illinois, and possibly the right to the possession of the same, should be sold away, and the connection and continuity of said line destroyed, and that if the same should follow, your receiver respectfully submits to the court whether it be not to the *advantage of the holders of the mortgage bonds, and of all parties in interest, that the court protect the title, continuity and possession of said line of railroad, by the issue of receiver's certificates, or otherwise, thereby said indebtedness specified in Schedule 'B' may be paid off.*"

The receiver then alleges that he is informed and believes that the creditors would voluntarily appear and set forth their respective claims, and ask the decision of the court on the same, and concludes with the prayer, (pages 20 and 21):

> "Wherefore said receiver asks that this honorable court will order said parties so to appear and interplead and set forth their respective claims in the matter of this state line stock, that the court may thereupon take such action as equity may permit, considering the rights of the parties which are now under the protection of this court, and that in the meantime, and until such decision may be arrived at, the court will enjoin said American Loan and Trust Company, of Boston, from the threatened sale of said capital stock of said Frankfort and State Line Railroad Company."

The decree of the court of January 29th (pages 23 and 24) has already been copied in part in this brief. It was further provided that the certificates should show that they were issued by virtue of orders of the Circuit Courts

of Indiana and Southern Illinois, copies of which should be endorsed thereon "in settlement of the indebtedness in said orders mentioned, and is part of the aggregate sum of one hundred and one thousand nineteen $\frac{91}{100}$ dollars, and interest, authorized by said order to be issued by me, as receiver of the Toledo, Cincinnati and St. Louis Railroad Company, and is, under order of said court, made and constituted, as provided in said order, a first and best lien upon all of the railroad of said company lying between the city of Kokomo, in the state of Indiana, and the city of East St. Louis, in the state of Illinois."

The decree further provided:

> "Said certificates shall not be delivered to said parties until all of them shall cancel all mechanics' liens claimed by them and dismiss all pending actions therefor, and shall surrender to said receiver said notes of said railroad company held by them, and shall cause said American Loan and Trust Company to consent in writing to this decree, and to deliver all of said stock to said receiver, to be in accordance with an agreement of all of said parties and order of this court hereby made that said stock shall remain in the possession of said receiver, subject to the further order of this court, and as a *continuing security for the payment of said certificates hereby authorized.*
>
> "All of this order is made with the consent of all of said creditors specified in said Schedule B, given in open court."

The rights of W. F. Ritchie having been reserved in the above decree, a decree was made in his favor as already stated, and in this it was provided that the auth-

ority under which the certificates were issued should be shown as follows, (page 30):

"This obligation is issued under and by virtue of an order of the Circuit Court of the United States for the District of Indiana, an order of the Circuit Court of the United States for the Southern District of Illinois, copies of which are endorsed hereon, in settlement of an indebtedness in said orders mentioned, and is part of the same indebtedness mentioned in the orders heretofore made therein, which was secured to the creditors of the Western Construction Company and others, for which the receiver had issued certificates aggregating the sum of one hundred and one thousand nineteen and $\frac{2}{100}$ dollars and interest, so that the whole indebtedness for which receiver's certificates are issued under said orders is one hundred and thirteen thousand nine hundred and forty-one and $\frac{82}{100}$ dollars, together with interest, as by said respective orders provided, and which authorized said certificates to be issued by me, as receiver of the Toledo, Cincinnati and St. Louis Railroad Company, and are, under the order made, constituted and provided, a first and best lien upon all the railroads of said company, lying between the city of Kokomo, in the state of Indiana, and the city of East St. Louis, in the state of Illinois.

"This order is in all respects similar to an order made in the case of Braman vs. Toledo, Cincinnati & St. Louis R. R. Co. *et al.*, and in the case of the Central Trust Company and Thomas H. Hendricks vs. The Toledo, Cincinnati R. R. Co. *et al.*, in the Circuit Court of the United States for the Southern District of Illinois."

After the intervening petition of McPherson had been filed, reference made and heard, and report of master filed, and exceptions to the same, but no determination of the exceptions by the court, the receiver brings the matter to the attention of the court by his petition for instructions. (Pages 91 and 92 of record.) He therein recites the petition of November, 1883, the decree of January 29, 1884, the Ritchie petition and decree, McPherson's petition and proceedings under the same, and concludes, (page 92):

> "Your petitioner further shows that the counsel of the bondholders have represented to him that your honors have intimated an opinion that the prayer of said intervening petition ought to be granted, and that they had procured the consent of said McPherson to accept in satisfaction of his claim, a similar certificate, secured by the same pledge as that issued to the other contractors under the above orders, except that it should not be payable until the first day of June, 1886. They further represented to the receiver that it would be to the interest of the trust to obtain the indulgence thus assented to by McPherson, and requested him to petition the court for leave to issue such certificate.
>
> "Your receiver respectfully submits the matter to your honors for instruction in the premises."

And thereupon the decree was made as already stated.

These decrees and the issuing of the certificates and cancelling of the debts for which they were issued, are set forth and counted upon by the bondholders for the purpose of strengthening their rights and equities as to this sixty miles of road, and conveying to the purchasers an unclouded title and thereby enhancing the purchase price.

In June, 1884, bills of complaint were filed in the Circuit Court of Indiana by the Central Trust Company, trustee for the bondholders, and by Edward F. Leonard, also on behalf of the bondholders, for the foreclosure of the mortgage on the line between Kokomo and East St. Louis; and by the fifth paragraph of each of said bills it was set forth and alleged as to this sixty (60) miles of road between Frankfort and the state line, as follows, (page 40):

> "Your orator shows that as to so much of said line of railroad as lies between the city of Frankfort, in the county of Clinton, in the state of Indiana, and the line dividing the states of Indiana and Illinois, extending southwesterly from said city of Frankfort to a point on said state line near the town of Eugene, in the state of Illinois, being a distance of about sixty miles, the said mortgage hereinbefore first above described creates *an equitable lien only, and is not a legal mortgage thereon; that legal title to said sixty miles of road was, at the date of said mortgage, and still is, vested in the Frankfort and State Line Railroad Company*, which is a corporation created by and existing under the laws of the state of Indiana."

It then set forth (pages 40 and 41) the contract between the Frankfort and State Line Company and the Western Construction Company substantially the same as it was set forth in the receiver's petition first above referred to. The building of the road; the issue of the certificates of stock; the intention that the same should form a part of the Toledo, Cincinnati and St. Louis Railroad Company, the possession of that road as a part of its line by the Toledo, Cincinnati and St. Louis Railroad Company and its possession by the receiver.

It also set forth (page 42) the accruing of the indebtedness to the contractors; the execution of the agreement of March, 1883, whereby the $1,800,000 of stock was delivered to the American Loan and Trust Company as security for the said indebtedness, and to be advertised and sold upon default being made upon the payment of said debts.

> "Your orator shows that said Toledo, Cincinnati and St. Louis Railroad Company, party of the first part to said agreement and defendant herein, made default in the payment of portions of said debts so assumed by it, and that thereupon—the demand of creditors interested, said American Loan and Trust Company advertised and was about to sell at public sale, all of said capital stock or so much thereof as might be found necessary for the payment of said debts; *that to prevent the sacrifice of said stock at such sale, and to prevent the breaking of the continuity of said line of railroad from Kokomo to East St. Louis, that might result from the passing of the capital stock of said Frankfort and State Line Railroad Company into other and perhaps adverse hands*, the Circuit Court of the United States for the Southern District of Illinois, upon the petition of William J. Craig, the receiver appointed in the suit pending in said last mentioned court, and hereinafter referred to, filed on the —— day of January, 1884, *by its decretal order authorized and directed said receiver to make and execute receiver's certificates that should be a paramount lien on said line of railroad from Kokomo to East St. Louis wherewith to pay said debts, to secure which said capital stock was so held in trust.*
>
> "It was further directed in said order that when

said capital stock should be so redeemed it should be held by said receiver subject to the order of the court, as further security for the payment of the receiver's certificates so to be issued, and after payment of said certificates to remain subject to the further order of the court as to its final disposition.

"For greater particularity your orator prays that reference may be had to the record of said petition and said order of court, as the same remain of record in said cause.

"*Your orator is advised that pursuant to said order the receiver in this case has executed receiver's certificates to an amount equal to the debts, for which said capital stock was pledged in trust, and has effected an arrangement with said creditors by which they have accepted said receiver's certificates in satisfaction of the claims*, and that all the certificates of said capital stock so pledged in trust, amounting at par value to $1,800,000, are now in the possession of the receiver, pursuant to said order."

The claims so made by the bondholders were resisted by the holders of the stock of the Frankfort and State Line Railroad other than the $1,800,000. The whole amount of the stock of that company was $2,000,000; $200,000 having been issued to parties other than the Construction Company. One John S. Smith, claiming to be the owner of some of this stock, filed his petition (page 56 and following) asking to be made a party; also E. R. Chapman filed a like petition. (Page 64.) They were admitted and filed a joint answer, (page 86,) and afterwards the Frankfort and State Line Railroad Company, by the same attorneys, filed an answer. (Page 94.)

These answers admitting the execution of the agreement, whereby the $1,800,000 of stock was transferred to the Loan and Trust Company, alleged among other things that there was not more than $40,000 due to creditors for the construction of its road, and that the stock ought not to be held for any larger amount.

To these were replications by the trustee for the bondholders and by the committee of bondholders, (pages 93, 94, 99,) and upon the issues so made testimony was taken before Mr. Fishback as master, and by him reported to the court. (Page 217 and following.)

The issues thus made were finally determined by the Circuit Court in the third paragraph of the general decree, made November 12th, 1885, and under which Mr. Kneeland made his purchase. This decree commences on page 190 of the record, and this paragraph is on pages 194-197.

The court there finds:

1. That this part of the road was built by the Construction Company under contract with the Frankfort and State Line Co.

2. That it was intended to be a part of the continuous line of road.

3. That it was to be paid for by $10,000 per mile in bonds, and by all its stock except that subscribed by others.

4. That the $1,800,000 of stock was afterwards pledged by the Construction Company to secure subcontractors' debts for work and material in construction of that and other portions of the road.

5. That by the agreement between the parties, the Toledo, Cincinnati and St. Louis Company assumed

these debts, and that upon the payment of the same this stock was to become the property of the latter company, the "stock, meanwhile, remaining in pledge as security for such payment."

6. On page 105 it finds:

> "That said Toledo, Cincinnati and St. Louis Railroad Company failed, prior to the commencement of this suit and the appointment of a receiver, to pay said debts so assumed by it; that *the receiver has, under the authority of the court, paid all the debts so assumed by the Toledo, Cincinnati and St. Louis Railroad Company for which said capital stock was so pledged, amounting in all to $——, by making and delivering to the said respective creditors receiver's certificates therefor, which are a lien upon said line of railroad extending from Kokomo to East St. Louis, and as further security for the payment of which he received and now holds the certificates for all said $1,800,000 of capital stock, and after the payment of said receiver's certificates he will hold said capital stock subject to the order of the court.*"

7. That the bonds and mortgages were made upon the entire line between Kokomo and East St. Louis, instead of separate bonds and mortgages upon the several sections, for the reason that bonds upon the entire line could be sold more advantageously, and that they were so made and sold and the line built and paid for.

8. That although a consolidation was not made, it was the intention that the $1,800,000 of stock should be used for that purpose.

9. On page 107:

> **"It is found that said Central Trust Company of**

New York and said Thomas H. Hendricks, trustee for the holders of said 7-30 bonds now outstanding, secured by said first above mentioned mortgage, and for their benefit, have in equity a lien on said Frankfort and State Line Railroad, and that the purchaser or purchasers of said mortgaged premises under this decree will, by virtue of such purchase, be entitled to take, hold, and own said \$1,500,000 of the capital stock of said Frankfort and State Line Railroad Company.

The record shows that from the first to the final decree in all these proceedings, to all of which the trustee of the bondholders was a party, it was everywhere alleged by the bondholders and all their representatives that the agreement of March 30, 1883, was valid, and that through and by virtue of it the \$1,800,000 of stock which was to come to the Toledo, Cincinnati and St. Louis Company upon the payment of these debts, gave them in equity a lien on this part of the road. They have been accorded the benefit of this position, and they cannot now, through Mr. Kneeland, as their representative, or otherwise, be allowed to assume a position inconsistent with it.

> "A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, to approbate and reprobate."
>
> *Bigelow on Estoppel, page 673, 4th edition.*

> "It may accordingly be laid down as a broad proposition that one who, without mistake, induced by the opposite party, has taken a particular position deliberately in the course of a litigation, must

act consistently with it; one cannot play fast and loose."

Bigelow, page 717, same edition.

Mr. Knoeland, regarded here simply as a purchaser, or claiming as a representative of the bondholders, may take advantage of and is bound by every estoppel operating upon any party to the proceedings.

> "A purchaser at the judicial sale is, in general, bound by and entitled to take advantage of every estoppel that could have been enforced by or against the party whose property is sold, *and this is equally applicable to the creditors under whose judgment or execution the sale is made.*"

And further:

> "Privies or those who derive title from or through the parties, ordinarily stand in the same position as the parties, and are bound by every estoppel that would have been binding on the parties."

Herman on Estoppel and Res Judicata, section 586, pages 719, 720, last edition.

Under the rights accorded to him in the car-rental cases, in 130 U. S., by reason of the form of the general decree of foreclosue, providing for the payment of the court and receiver's indebtedness in bonds and coupons, he can stand in no better condition nor with any greater rights than any other holder of the bonds. As a bondholder, purchaser at the foreclosure sale, or representative of the holders of the bonds, he can at best only have their rights, subject to the burdens and limitations imposed thereon.

He must be held bound by the acts of their trustees and others authorized to act for them, and as they could

not, after the sale, assume positions inconsistent with those taken by them before the sale, nor dispute orders or decrees of the court procured by or assented to by them, or which the court in proceedings to which they were parties had made for the purpose of strengthening their securities, or increasing the proceeds of the sale, so he is equally limited.

It is only to this extent, and subject to these limitations, that Mr. Kneeland can be taken out of the rules laid down in *Stuart vs. Gay, 127 United States, pages 518 to 530.*

That the bondholders must be held to have been benefitted by having a sale of the entire line between Kokomo and East St. Louis as a whole, free from any question as to the title to the sixty (60) miles, is so clear as not to require argument.

By the issue of the certificates the undisputed possession was retained until the sale, and on the sale went into the general property sold on the foreclosure.

Kneeland vs. Bass Foundry, etc., 140 U. S., 592, decided at last term of court. The language of Mr. Justice Lamar, in the opinion in that case (page 596), is equally applicable here.

> "They contributed to the preservation of the property during the receivership, and *went towards the fund arising from the sale on the foreclosure.* Under such circumstances the court appointing the receiver was justified under the rule laid down in *Kneeland vs. American Loan and Trust Company, supra*, in preferring such claim to the claims of the bondholders whose property they assisted in preserving."

The value of the line as a whole, in comparison with

a part of the same, is well stated in the opinion of this court as delivered by Mr. Justice Bradley in *Union Pacific Railway Company vs. Cheyenne, 113 United States, page 518 (page 522)*:

> "A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation. A separate mile or two of its length is almost valueless by itself."

This language, although used in connection with value as assessed for taxation, is equally applicable here. The disconnected portions of this line would have been practically valueless, and no bid would have been made by anyone either on the disconnected portions or upon the whole, with a cloud hanging over the title to this connecting link.

THIRD.

The appellant is not now in position to dispute these certificates, or question their payment as a part of the receiver's indebtedness, not only by reason of the facts appearing in the record under which he purchased, but also by reason of the acts and acquiescence of the bondholders for whom he now appears as trustee and representative, through their trustee named in the mortgage and the bondholders' committee acting for them AS SHOWN BY THE EVIDENCE BEFORE THE MASTER.

The duties of trustees are stated and illustrated in the opinion of the court as delivered by Mr. Justice Brewer, in the car-rental cases, pages 101-103, 136 U. S. With other language used is the following, (page 102):

> "It is a mistake to suppose that their duties in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest; and it is a part of their duty to make examination and become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with."

Not only this particular sentence from the opinion, but the principles generally upon which the car-rentals were sustained as a part of the receiver's indebtedness are applicable here.

The decision in *The Central Trust Company vs. Seasongood, 130 U. S. 482*, is directly in point.

The language of the opinion in the latter case, as stated by Mr. Justice Harlan, may, with hardly a change in the words, be used here, (page 492):

> "We need not, however, stop to inquire whether it was proper for the Circuit Court to issue receiver's certificates for claims of the character of those held by the appellee. Upon that subject we express no opinion. We are relieved of any duty to consider that question, because it is apparent that the order of December 8th, 1883, was the result of an agreement or arrangement between the appellee and the Central Trust Company—the latter representing in this cause the holders of bonds secured by the mortgage of November 17th, 1880,—and also because of the surrender by the appellee, in

consideration of the receiver's certificate for the amount of his claim, of the rights accorded to him by the decree in the state court. The appellee cannot be restored to his rights under the decree of the state court, and it would be inequitable to permit the appellant, representing those who purchase the property under the decree of the Circuit Court, now to raise any question as to the validity of the receiver's certificates, which it agreed might be issued to the appellee. It remained quiet for nearly two years, and until after the property had been sold, and after the sale had been confirmed to those it represented, before making an issue as to the propriety or validity of the order of December 3d, 1883. The bondholders are concluded, under the circumstances disclosed in the record, by what their representatives did, or assented to being done, in order to induce the appellee to surrender the rights secured by the judgment of the state court."

In order to make clear the manifest injustice that would result if the appellant in the case at bar shall be now permitted to dispute the validity of these receiver's certificates, it is only necessary to review a small part of the evidence in the record. Attention is called to a few points:

1. *The position of the parties at the time of the appointment of the receiver.*

The bondholders held through their trustee, the Central Trust Company, a mortgage as security for the bonds *purporting* to cover the line from Kokomo to East St. Louis. This line was made up of several independent roads, with each of which the Western Construction Company had a contract.

All of these roads had been consolidated into the Toledo, Cincinnati and St. Louis Railroad Company, except the Frankfort and State Line Company, covering the sixty miles between Frankfort and the line between Indiana and Illinois. (Pages 262-298.)

One million eight hundred thousand dollars of the $2,000,000 of the stock of this road was the property of the Western Construction Company, and that company being indebteded to sundry sub-contractors who claimed to have liens on the road, and suits pending for their enforcement, had pledged it to them as security for their claims.

The creditors wishing to get their pay without litigation, and the Toledo, Cincinnati and St. Louis Company wishing to get this stock so as to get the control of the sixty miles of road, the railroad company assumed the debts and gave its notes payable at certain dates, and the stock was placed in trust with the American Loan and Trust Company in pledge, to be held as seurity for the payment of the company's notes, and upon their payment to become the property of and to be delivered to the company, and the suits dismissed and liens and claims of the creditors cancelled. (Agreement, March, 1883, pages 15-19.)

Default had been made in the payment of these notes, and the creditors had called upon the Trust Company to enforce payment by advertisement and sale of the stock in accordance with the terms of the trust agreement. The first advertisement was made October 15th, 1883, for sale to be made November 21st, 1883. (Pages 1154 and 1155.)

2. *The proceedings then open to the bondholders.*

This being the situation the bondholders might either

have left these creditors to stand upon their right as they might be determined, might have contested their liens or the validity of the assignment of the stock, or might have let the stock go to sale and have contested the rights of the purchasers.

If they or their representatives had taken either of these courses, none of the questions now made could ever have arisen. It is by reason of the course which they did take, and the change of relations thereby produced, that *this* litigation was rendered possible. The parties here now asking for their money at the hands of the court would never have had any money invested for which to ask.

3. *What the bondholders did do. Decree of January, 1884.*

They chose not to contest the claims made by the creditors, but to procure the action of the court, and did procure, not only by their consent, but by their active participation, the making of the order of January 29th, 1884, and sought to and did induce the creditors to accept the certificates as issued under the orders of the court, and release their other securities.

This will sufficiently appear by examination of the evidence in the record, and attention is called especially to the testimony of John Felt Osgood and Richard Olney, of Boston, Thomas E. Stillman, of New York, R. E. Rombauer, H. S. Hopkins and Joseph Dickson, of St. Louis.

Briefly stated the following facts appear:

September 27th, 1883, at a large meeting of the bondholders held at the Parker House, Boston, a committee was appointed of which Mr. Osgood was elected

chairman, and on October 12th issued a circular. (Pages 756 and 757.) This circular says: "The instructions to the committee were to *protect the property in its entirety, prevent the breaking up of the road*, and give to each class of security holders their full right, and, if possible, have but one receiver."

In advancement of this purpose Mr. Osgood, acting as he says in the interest of all the bondholders, went west and saw Judge Drummond. He also went to New York and had a meeting with Mr. Hopkins, one of the largest of these creditors; Mr. Stillman, attorney for the Central Trust Company; Mr. Quigley, who was his successor on the committee, and other bondholders, and after full discussion notified Hopkins, and Mr. Olney, attorney for the creditors, that he would approve the issue of the certificates if they would postpone the sale. See Mr. Osgood's testimony, pages 736, 739, 752 and 753, etc.

This New York meeting was held the day before that on which the sale was to be held at Boston. The sale had been, under a prior notice, postponed, but Mr. Hopkins refused to longer postpone until the bondholders had agreed to the issue of the certificates. Mr. Hopkin's testimony, pages 846 to 851.

Mr. Stillman telegraphed the result to Judge Drummond as follows, (pages 847, 859, 865):

> "Hon. Thomas Drummond, Chicago, Ill.:
>
> "The sale of stock covering line from Frankfort to state line is adjourned until after conference between yourself and Baxter. If an earlier sale becomes necessary I will come before you with representative of Loan and Trust Company and agree

on plan for redemption of stock. I am now satisfied that the hypothecation is valid. Signed by

"T. E. STILLMAN."

Mr. Olney says he saw Mr. Osgood and Mr. Philips, one of the bondholders' committee, and Mr. Hyde, and he says, (page 783):

A. "Well, the inducements held out were that the claims would be paid in full if we could arrange a time in which it could be done. How soon the receiver's certificates were to be paid I don't know. I presume I could ascertain; that it should be postponed until receiver's certificates could be issued, and the sale of the collateral was postponed from time to time on that inducement and expectation."

Mr. Stillman went west and saw Judge Drummond, and after investigation and his return home, and just prior to the entry of the order, sent the following telegram, (page 789):

"January 23d, 1884.

"Hon. Thomas Drummond, Chicago:

"As representing the Central Trust Company, I consent to the issue of receiver's certificates covering the road from Kokomo to St. Louis, if you are satisfied the claim is a just one.

"THOMAS E. STILLMAN."

Mr. Rombauer, who was the attorney for the creditors at St. Louis, states very fully what transpired before Judge Drummond. Mr. Rombauer opposed the receiver's petition for an injunction, claiming that the court had no jurisdiction to interfere with the sale, and several hearings were had. Judge Drummond deemed it of such importance that the road should not be broken into fragments that he announced his purpose to try at least

to stop the sale unless some arrangement could be made. His testimony as to this will be found on pages 645 and following. On page 649, among other things, will be found this question and answer:

> Q. "Can you remember at this time from what source came the first idea of getting over this matter by the issue of receiver's certificates and having those accepted and the sale in that way stopped?"
>
> A. "Judge Drummond, I believe, suggested the idea. I perhaps may add here that during these discussions, repeatedly, while I was objecting to his interfering in this matter, Judge Drummond repeatedly stated that he would see that these creditors were completely secured before he would make any order, and that they were secured in a manner satisfactory to themselves."

It was after such assurances as these, and in view of the determination of Judge Drummond to stop the sale in some way, that the creditors consented to receive the certificates; and Judge Drummond was so careful in the matter that he either drafted or corrected the decree, and insisted on its reciting the consent of the creditors and the provision that the consent should also be obtained of the Loan and Trust Company, their trustee. Mr. Dickson states the manner in which the decree was prepared, page 604 and following.

4. *As to the Ritchie decree.*

He occupied the same position as the other creditors, down to the time, or about the time, when this order of January was entered, but was not included in that order for the reason that there was a dispute as to the amount due him on his claim.

When this dispute had been determined by the finding of the court upon evidence, he was, by the decree of March, 1884, placed in the same position as the others, and accepted the certificates on the same condition, the former decree being recited in this.

The details as to the entry of this decree are stated by Mr. Dickson, pages 606-608.

5. *McPherson decree.*

There was a contest over the rights of McPherson to come in on the same footing as the other creditors. This having been settled by the report before the master, and the finding of the court overruling the exceptions to the same, the statement in the petition of the receiver that the counsel for the bondholders had represented to him "that they had procured the consent of said McPherson to accept in satisfaction of his claim, a similar certificate, secured by the same pledge, as that issued to the other contractors under the above orders," was made a part of the decree of the court.

This petition, although signed by the receiver, was prepared by the attorney for the Central Trust Company, Mr. Hendricks, and was never even seen by the attorney for the receiver. (Testimony of N. H. Swayne, page 683.)

In the hearing on this claim the Central Trust Company was represented by Mr. A. W. Hendricks, and the bondholders' committee by Mr. John M. Butler.

In the argument in opposition to this claim, Mr. Hendricks recognizes the decree of January, 1884, and also the Ritchie decree, as being valid. On page 1167, among his points he says that "by the contract of March, 1883, it (The Western Construction Company) turned over all

the stock to the Trust Company, of Boston, for the benefit of certain of the creditors specified in the contract, of which McPherson was not one."

Again: "The Construction Company had full authority to specify which of its creditors should be paid or secured out of the stock."

Again, speaking of the sale of the stock: "The Railroad Company being in default in the payment of the debts of the Construction Company, as provided in the contract of March, 1883, the stock was about to be sold for the payment of the debts for which it was pledged. Such sale would endanger the continuity of the line."

On page 1170 is a communication from Judge Drummond to Mr. Hendricks, in which he says:

> "Now the question is whether it is not better for the bondholders, and those who are interested in the continuous line of road from Kokomo to St. Louis, to consent that McPherson shall, as the others have done, take receiver's certificates, which is the remedy which he has asked by his petition. If they do not assent to this, it seems to me that the court ought to permit McPherson to have the prayer of his petition in the alternative, either for receiver's certificates or that the stock should be sold to protect the equity which he has upon it for the debt. I confess it has seemed to me preferable, and indeed more simple, that McPherson should be treated as the other creditors have been, rather than complicate matters still further by the sale, and possible purchase by parties hostile to the bondholders, of this Frankfort stock."

In answer to this the counsel urge that the matter be

left to settlement in the final decree, and among other things, say, (page 1171):

> "Our hope was that all these questions would be adjusted at the same time by final decree. As respects the other contractors, the mortgagees were in their power, and there was necessity for interlocutory action. Nothing of the sort exists here, and we cannot see any equitable reason why Mr. McPherson, more than any other creditor, should be provided for by interlocutory order.
>
> "The committee of bondholders are anxiously considering how they may raise money to save the St. Louis terminal property, and for other indispensable purposes. Of course every additional receiver's certificate issued increases the difficulty."

On pages 1173-1179 will be found exceptions to the master's report, and the same considerations are repeated. It is said as to the certificates before provided for that there existed an exigency by reason of the danger of the stock sale. That they were issued by consent of all the parties, and as a result—

> "*The stock has been saved and the continuity of the line preserved.*" (Page 1173.)
>
> "As respects the other contractors, the mortgages were in their power for reasons heretofore given, and there was an exigency which made an interlocutory decree necessary." (Page 1176.)
>
> "The other contractors were paid by receiver's certificates, not because they had any such preference, but because they were pledgees of the 18,000 shares of stock, and were about to enforce them in such a manner as might result in great injury to the

mortgage bondholders. It was necessary for the bondholders to protect themselves by paying the claims of the pledgees.

"Therefore they consented to the issuing of the certificates; but no such reason exists here, and the bondholders do not consent to pay this debt—at least for any reason shown in this case." (Page 1177.)

The course of the hearing and the contention of the respective parties are detailed in the testimony of Joseph Dickson, page 610 and following.

The positions then taken by the counsel for the bondholders were consistent with all that had been before that time done with reference to the certificates, but they are wholly inconsistent with the position which they now take in *attacking* the certificates.

When the exigency was upon them the bondholders consented to the payment of all these debts (except the McPherson) by the issue of the certificates, and the *stock having been saved and the continuity of the line preserved*, they seek to defer the question as to further issue to McPherson until the final decree in the case, but there is no suggestion that they would or could dispute the certificates already issued, or the certificates as to which the contention was then being had, in case the court should order them to be issued.

It may be further said that, although counsel did contest the McPherson claim most vigorously down to the time when the court finally concluded to order the issue of certificates to him, yet when the order was made it was recited that it was made by consent, and the order as so made was approved by counsel for the bondholders. The draft of the decree is exhibit 219, found on pages 1171-2 of the record. It recites, (bottom of page 1171):

"And said petition of the receiver being heard, and the court being fully advised of and concerning the same, it is ordered, adjudged and decreed, *the parties present consenting*, that Wm. J. Craig, receiver of the Toledo, Cincinnati & St. Louis R. R. Co., issue and deliver to Henry McPherson receiver's certificates," etc.

This exhibit, as printed, does not bear the signature of either Mr. Butler or Mr. Hendricks, but Mr. Butler's "O. K." appears upon the original, and he was called as a witness by counsel for the appellant to explain his signature. (See page 727 and following of the record.)

Mr. Butler testifies in substance that he put his "O.K." on the entry as indicating that the entry set forth correctly the order as made by the court; but he does not explain why he should approve an order reciting either that the bondholders or the trustee *consented* to the order, unless the consent was in fact given.

6. *Mr. Quigley, chairman of the bondholders' committee, consented to and acquiesced in the issue of the certificates.*

Mr. James M. Quigley appeared on the scene early in January, 1884. Exactly the date at which he became a member of the bondholders' committee is not very clear. He was present as the meeting in Mr. Stillman's office early in January. (Osgood, page 752; Hopkins, page 847). He went west with Mr. Osgood in February, 1884. (Osgood, page 751). It must have been soon after that Mr. Osgood resigned and Mr. Quigley took his place as chairman of that committee. (Osgood, page 736.)

From that time down to the sale of the road to the

appellant, he, as the chairman of that committee, and in connection with attorneys by him specially employed to act on behalf of the bondholders, and in connection with the attorneys for the trustee under the mortgage, was vigilent and active in giving personal attention to everything that was done by anybody in connection with any of these foreclosure proceedings. On sale of the road he appears as agent for appellant.

He must have had, and in the nature of the case will be presumed to have had knowledge of every order and decree made by any of the several courts in which any of these proceedings were pending.

He did resist the entry of the decree ordering the issue of the McPherson certificates, but the resistance was distinctly on the ground that he (McPherson) was not entitled to the same rights as the others, and when the court decided otherwise he at least acquiesced, if he did not consent, and although thereafter actively resisting every proceeding that he considered wrong or against the interest of the bondholders, and through his attorneys filing exceptions and contesting orders whenever or wherever he or they thought necessary, he never, down to the time of the sale, so far as it appears in the testimony, made any exceptions or intimated any dissatisfaction with these several decrees or either of them.

He and his attorneys and the attorneys for the Trust Company must be presumed to have known, and unquestionably did in fact know of the issue of these certificates; the acceptance of the same by the creditors; the surrender of the $1,800,000 of stock held by the American Loan and Trust Company to the receiver, and the release and surrender by the creditors of their several liens and claims, and stood quietly by, acquiescing in all that was done.

7. With full knowledge that the certificates were being sold upon the market, no objection was made by Mr. Quigley or any bondholder.

It is clearly shown that Mr. Quigley knew that these certifiicates had been, after their issue, placed upon the market for sale, and that the present holders of these certificates, or at least some of them, and these the holders of the larger amounts of them, were purchasing them for cash at nearly or quite their face value, with no notice or suspicion that their payment out of the proceeds of the sale of the road when made, prior to any claim of the bondholders, would be for a moment resisted.

Mr. Newton, in his testimony, page 670 and following, states that he met Mr. Quigley in New York about September, 1885, in reference to the sale of the road and the payment of these certificates, and that Mr. Quigley then tried to get him and Mr. Luce in consequence of their large interest to furnish further money to keep the road going during the winter. Newton testifies that Mr. Quigley knew before that that he (Newton) and Luce had been buying and were buying large amounts of these certificates, and never intimated any purpose to resist their payment.

He of course knew, must have known, any and every bondholder or other party in interest must have known, that any attack that should be made by him, or by any party in interest, either by any proceedings in court or by declaration out of court, would have at once stopped the sale of these certificates. Mr. Quigley does not testify as a witness, and the evidence as to facts which came to his knowledge and the fair presumptions arising from the same are undisputed.

What action might have been taken by these creditors or any of them, if either he or any of the other parties who would have been recognized by the public as representatives of the bondholders, had in any way discredited the certificates, he of course did not know.

But whatever his fears or his motives, or the fears or motives of other bondholders, he and they did choose to lie by quietly until the sale of the road as a whole had been made, and only then, and in fact not until some months after that time, was any open attack made upon these certificates, either by him or by them or by any other party claiming to represent him or them.

8. *The creditors released all their liens and could not now be restored to the rights or claims which they then surrendered.*

It was one of the provisions of each of these orders that the certificates should not be delivered to the creditors until they had released all liens and dismissed all suits, wherever pending. This they were required to do and did do, the papers being submitted to the attorney for the receiver and approved by him before they were accepted by the receiver. Dickson, pages 615, 619; N. H. Swayne, 681, 682, etc.

9. *Mr. Kneeland has also used the $1,800,000 of stock since the purchase by him under the decree.*

The decree of foreclosure and sale provided, (page 108):

> "It is further ordered, adjudged and decreed that upon the sale herein ordered, and upon the delivery to the purchaser or purchasers of the possession of the mortgaged premises, the receiver shall assign

> and deliver to him or them, as his or their property, the certificates representing one million eight hundred thousand dollars of the capital stock of the Frankfort and State Line Railroad Company."

In the summer of 1886, after the sale of the road, Mr. Kneeland, as the owner of this stock, was present by proxy voting this stock at a meeting of the stockholders of the Frankfort and State Line Railroad Company for the purpose of thereby controling the election of directors of that company. See testimony of Mr. Dickson, page 643.

In view of these several acts of these bondholders, their trustees, committees, attorneys selected by them, and acting under their supervision, the consents given by them, their long silence and acquiescence, while innocent parties with their full knowledge were investing their money in these certificates, if they or the appellant here can now be permitted to dispute these certificates it would be difficult to conceive what act or conduct could in any case create an estopple. There are certainly in the facts of this case as potent reasons for applying the familiar doctrines above quoted from the 130 U. S. as existed in the facts of that case.

I will also quote as applicable to the facts in this case from the opinion of this court as delivered by Mr. Justice Blatchford in the *Mitlenbeager case, 106 U. S., at page 308:*

> "On the other hand, it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and

content themselves with merely protesting generally, and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill, that the piece of road from Clymer's Station to Logansport, and the bridge, and the land, and the rolling stock, and the other property acquired by the receiver, and now alleged to have been acquired by him without authority, were subject to the lien of the first mortgage, and now claim the proceeds of that property, without paying the debts incurred for acquiring it. A court of equity, however it might act on the question of original authority or discretion, if presented in season, and under circumstances of good faith, will not visit upon innocent parties dealing with the receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him."

Humphrys vs. Allen, 101 Ills. 490, is a leading case among the decisions of the state courts, and is in point.

The court held in that case just what I claim must be held here, that the bondholder who had notice that certificates which were to constitute a first lien on the property were *about to be issued* and put upon the market, must then make his objection, and that where he lay by until they had been issued and other parties had in good faith put their money into them, he was not in a position to question the action of the court in issuing them.

FOURTH.

The present holders of these certificates having purchased the same upon the faith and credit of the decrees of a court having jurisdiction in the matter, and made in a case where all persons in interest were parties, are entitled to the protection which is accorded to those who deal with judicial tribunals having jurisdiction in the premises.

The substance of this proposition is taken from the language of *Mr. Justice Harlan, in Hervey vs. Illinois Midland Company, 28 Federal Reporter, page 177*, as quoted and approved in the opinion of this court, delivered by Mr. Justice Blatchford, in the case of *Union Trust Company vs. Illinois Midland Company, 117 U. S., 434.*

It is stated here in answer to the main position taken by counsel for the appellant, in the hearing of this case in the court below.

The bold statement made by him in the brief filed with Judge Gresham is there stated as follows: "Whenever the certificate holders come to the court it is precisely the same as though the original party came to court." The argument as developed, being that the holder of the certificates would be required before he could draw from the registry of the court the money called for by his certificates, to prove both the validity and priority of the debt for which the certificates were issued.

Such a doctrine would, if established, destroy the usefulness of receivers' certificates, and no business man would have anything to do with them if they stood upon that footing. The position seems, however, to have been taken by counsel in the *Farmers' Loan and Trust Company case in 129 U. S.*, already cited, but the decision of the court was directly against it. This ap-

pears from the quotation already made from the opinion of the court in that case, page 214.

It is not claimed that these certificates are commercial paper, in the strict sense of the term, but they are papers sent forth to the world by the court, with the impress of its authority upon them, the object and purpose being to give them standing and credit in the business world.

Judge Drummond, at the time of making the order of January 29th, 1884, spoke of them as the "*court notes*" or the "*court papers*." See Mr. Hopkins' testimony, page 851. Such a designation of them would go further to induce a business man like Mr. Hopkins to accept the certificates, in the belief that they could be used in a business way, than would any merely legal definition or designation.

The Illinois Midland case in the 117 U. S., above cited, is a leading case upon questions involving the standing of such certificates, there being under review in that case several classes of receiver's certificates.

On page 461, in the opinion of the court, and as a part of the quotation above referred to, is the following language:

> "As to receiver's certificates issued, with the sanction of the court, after the trustees became parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

I copy this part of the quotation, for the reason that it is directly applicable to the facts in the case at bar, and as will be seen, is applicable alike to *purchasers* and *holders* of certificates. In other words, this pro-

tection belongs to the creditors who took these certificates under these decrees, and in discharge of their original claims, and it belongs, also with still greater reason, to those who have since purchased of the original parties, and paid them for their certificates.

What authority, if any, may be cited by counsel for appellant in this court, or what position may be taken is not now apparent, as no brief or assignment of errors has as yet been filed on his belalf; but in the court below, this Illinois Midland case was claimed by his counsel to have "expressly decided" that receiver's certificates were "simply commercial conveniences, and that their defenses go with them." There is, it is submitted, nothing in the decision or in any part of the opinion in that case to that effect as applied to any certificate issued *after the trustee for the bondholders had been made a party to the proceedings.*

In the case at bar the Central Trust Company had been made a party, and had entered its appearance at the commencement of the proceedings, and its attorneys were active in representing the interest of the bondholders, not only in those relating to the issue of these certificates but in all action taken both prior and subsequent.

Among the classes of certificates in question in the Illinois Midland case, were two series which had been purchased by third parties from the receiver.

The question was made as to whether the receiver had properly applied these proceeds; but the Circuit Court, upon the authority of *Stanton vs. Railroad Company, 2 Woods, 506*, held that the purchasers were not bound to see to the application of the proceeds. In that view this court concurs.

There is, in the course of the opinion in the Illinois

Midland case, on page 454 and following, a discussion of the reasons for, and the necessity and propriety of, the exercise by the court of the power to issue certificates in order to preserve property which has come into the hands of the court.

It is said that this must be done by the hands of the court through its officers, and that the character of the property must determine the particular acts required for its preservation.

That this preservation must necessarily be made, not only in the interests of all persons interested, and of all classes and descriptions of liens, but in the case of a railroad, also in the interest and for the protection of the public in providing the public with a public highway, as a consideration for the franchise granted to the corporation.

The matter under consideration in this discussion by the court, was the making and keeping up of necessary repairs for the continued operation of the road. But the reasons given are equally applicable to the circumstances of this case, and equally warrant the issue of certificates as a means of protecting the continuity of the road and of retaining the possession and control of the same by the receiver undisturbed, and its operation under the one management.

It is of course for the court having at the time charge of the property, to determine in any given case what action is necessary on its part, in the execution of its trust in the premises; but such action is, nevertheless, the *judicial* action of the court, to be treated as such by the courts, the parties, and the world at large, and such judicial action, when exercised, must be reviewed, if at all, in the same manner as any other judicial action of the court.

That great responsibility in this way is thrown upon the judges of the Circuit Court whose action is thus invoked, and that great care should be taken by these courts in exercising this power, cannot be questioned.

But because of this, and of the large financial interests that may be and usually are affected, the greater faith and credit must, in the nature of things, be given to the action of these courts when thus exercised.

Very large interests may require *some* action to be taken. Very great losses may result to innocent parties if the action, *when* taken, shall not be sustained, and it is the imperative duty of the courts to see to it that nothing which they have done, or nothing which they may fail to do, should result in serious loss to such parties.

The following statement by Mr. Justice Brewer, when sitting as Circuit Judge in the case of the *Wabash, St. L. & P. R. R. Co. vs. Central Trust Company, 22 Federal Reporter, page 269*, is very clear and comprehensive:

> "And in this connection permit me to say, generally, in reference to receiver's obligations, I think the court should be very slow in authorizing or directing its receiver to enter into obligations; none should be created which the necessity of the case do not absolutely require. It is not the function of the court to go into the business of railroad or manufacturing, and have property on its hands, continued there indefinitely. Whenever, from the circumstances of the case, it is found necessary to take possession of property, it should preserve it and manage it so far as is necessary to keep it intact and free from loss or injury; and if need be, in order so that it may issue receiver's certificates,

or direct the receivers to issue other obligations. Whenever it does so, I think it is the imperative duty of the court to see that these obligations, thus authorized or directed, are held sacred to the very letter and spirit; that there should not be anything for outside litigation, but that the court, having authorized or directed these obligations and contracts to be entered into, should see to it that they are sacredly performed; and though afterwards it may seem that these obligations were unfortunately created, or without sufficient consideration, still there is no duty more sacred upon the court than to see that these obligations are kept."

Farmers' Loan & Trust Company vs. B. & S. W. R. Company, 32 Federal Reporter, page 805, was another case in which Mr. Justice Brewer, as Circuit Judge, in delivering the opinion of that court, clearly defines the duty of the court in reference to the protection of receiver's certificates. From the opinion it appears that the position taken on the one hand was not that taken by Mr. Kneeland's attorney here, but admitting that the holder of the receiver's certificate occupied a position in which he had the advantage that his priorities were judicially declared in advance, yet that, in order to obtain relief, he must come in and intervene and prosecute his claim as any other lien holder.

It was, on the other hand, claimed that upon a mere suggestion by the holder of the certificates that the same had not been paid; the court owed to the holders of its contracts not merely the duty of providing a forum in which they might enforce the same, but that it owed to them *performance*.

And the court, after stating these opinions, says:

> "I agree with the last named views. The court should be chary of promise, but eager of performance; careful not to burden property in its possession with obligations, and equally careful to see that every obligation is discharged before that possession is finally surrendered. It owes performance, and should assume all its burdens, and not turn the holder of its contract off with simply the assurance that he has a valid lien which he may foreclose."

The *power* of courts having property in its possession, to issue certificates for the purpose of its preservation, has been so firmly established by repeated decisions by the courts of many states, by the federal Circuit Courts, and by this court, that any lengthy discussion or citation of authorities would now be out of place.

In the *Miltenberger case, 106 U. S., on page 311*, in the opinion of the court, is the following:

> "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property, under the order of this court, with a priority of lien. Yet the discretion to do so should be exercised with very great care."

There are many cases in which the power to issue such certificates, and make them the first lien upon the property, or in the language above, pay them, when necessary, out of the *corpus*, where the earnings were insufficient for that purpose, has been exercised, and the certificates, when issued, have been sustained.

And this has been repeatedly done, not only for the

purpose of paying running expenses which had accrued before the receivership, and also to pay for betterments or other improvements put upon the property after the receiver had been appointed, but also to pay for the completion of uncompleted portions of the work that the court may deem necessary or important, by reason of some exigency connected with the road, to have completed.

Kennedy vs. St. Paul & P. R. R. Company, 2 Dillon, 449, is an old case which has never been discredited. There a land grant was dependent upon the completion within a limited time, of certain lines of the road.

The road was heavily mortgaged and the company insolvent, and could not complete the road. The receiver was ordered to proceed to its completion, and for the purpose of raising the money necessary to do so, to issue his certificates in a sum not exceeding $5,000,000. And these certificates were charged as a *first* lien upon all the property of the company.

Jerome vs. McCarter, 94 United States, page 735.

A land grant for a ship canal was to revert unless the canal was completed within a certain time.

The company being insolvent, $500,000 of certificates were issued, by the order of the Circuit Court, for the purpose of completing the canal and saving the grant, and the order was sustained upon error by this court.

Wallace vs. Loomis, 97 United States, page 146.

In the order appointing receivers they were authorized to "put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock and operate the road to the best advantage, etc.,"

and the order further provided that for the purpose of raising money to enable the receiver to perform this duty he should issue certificates to an amount limited in the order, and that such certificates should be the *first* lien upon the property of the company.

This action of the Circuit Court was approved by this court in language (page 162) which has been so often quoted, and which is so familiar to this court that it is not necessary to repeat it here.

In the *Miltenberger case, in 106 U. S.*, already referred to, on page 295 and following, in the opinion of the court, is a statement of the purposes for which the receiver's certificates there in question had been issued. The question of their issue had been presented to the court by the receiver, and it appears that $30,000 were required for the purpose of completing five (5) miles of road, and building a bridge in order to make connection with another road ; and $10,000 for the purpose of paying an indebtedness due to connecting roads, and the receiver represented that it it would be to the interest of the bondholders to have these expenditures made. The trustee for the bondholders opposed this.

No order of the court seems to have been made at that time, but after consultation with representatives of bondholders, the expenditure was made, and the court ordered the receiver to issue certificates to pay the indebtedness and make the improvements, and this court upon appeal, affirmed the decree of the Circuit Court—making these the first lien upon the proceeds of the sale of the property of the company.

In view of the number of cases in this court in point in this discussion, and of the recent dates of these decisions, it is not proper to go into the reports of other

courts to any considerable extent, but in view of the ability displayed in the opinion and the frequent reference made to it by this as well as other courts, will take the liberty to cite *Meyer vs. Johnson, 53 Ala. 237*, referring especially to clause ten in the opinion of the court, pages 346-350. On page 349, speaking of the character of these certificates, the language of the court is very much the same as that used by Judge Drummond in speaking of these certificates to Mr. Hopkins.

> "The certificates are not debts of the company, but of the receivers backed by the pledged faith of the court; that the property on the proceeds of which they are charged, is in its posession, subject to be, and that it will be disposed of by it for the payment of them. This results from the fact that they are but a substitute for common methods by which money is raised for the use of a receiver in a particular cause, a mode of appropriating, in advance, a portion of the value of the property, in order to enable the court to save a greater value thereof from destruction."

The court in that case, as other courts in many other cases have done, speaks of the danger there might be that the power might be injudiciously or unjustly exercised, that mortgagors and mortgagees might be improved out of their property and contract obligations destroyed, but the remedies by which such wrongs are to be corrected are precisely those provided for the correction of other errors of the courts.

The Farmers' Loan and Trust Company case already cited, in 129 U. S., clearly determines that the remedy in such case is by error or appeal from the order made by the Circuit Court authorizing the issue of certificates,

and determining their priority, and in that manner *alone* can such orders be reviewed or reversed. That remedy is, however, full and ample.

FIFTH.

Mr. Kneeland, the appellant, cannot attack collaterally the decrees providing for the issue of the certificates.

As a legal proposition, this is elementary, and needs no discussion. The only question that could be raised is whether the attack here sought to be made by Mr. Kneeland's counsel is direct or collateral in its nature.

An examination of the record will show:

1. *That the proceeding on the part of Mr. Kneeland in the court below was not one to amend or vacate either of the orders of the court, under which the certificates were issued, for fraud.*

2. *That the effort was nothing more than an attempt to have the court rehear the questions which were before it, and adjudicated by it when these orders were made.*

The arguments of Mr. Kneeland's counsel before the master and before the Circuit Court, substantially amounted to a *criticism* of the action of the court in making these orders. It was urged, by the use of language of which the eloquent gentlemen are such masters, in every conceivable form, that the court was misled or mistaken in making these orders; that the court did not have the facts before it at the time it made the orders, and that if they had been before it the court would not have made the orders.

They then claimed, and I suppose will continue to

claim, the right to go over all the evidence now produced and have the court now pass *de novo* upon the question as to whether these decress *ought* to have been made. They urged before the master that "if these facts had been before Judge Drummond he would have issued no certificates." Before Judge Gresham they asked "that the case be decided precisely as though the original claimants were now before the court on one side, and the holders of the first mortgage bonds on the other." In fact the remark will certainly not be considered harsh if it be said that the effort of counsel for appellant, in the cases growing out of this foreclosure, has very generally been to go back and re-open and re-litigate. The car-rental cases may be cited in support of this remark.

Not for a moment conceding the correctness of this or any like position of appellant's counsel already made or that may be made, but for the purpose of more clearly showing the correctness of my propositions above, the attention of the court is called to the several orders of reference to Mr. Ricks, the master, and to the proceedings had under these orders.

The first order of reference to the master having any connection with the hearing before him was made substantially at the time of the decree of foreclosure and order of sale of the property. (Page 99.) The date of the order of reference, as it stands upon the journal of the court, is November 5th, 1885, and the order of sale November 12th, 1885.

> "These cases came on to be further heard, and counsel for the respective parties having appeared, upon consideration it is ordered that it be referred to A. J. Ricks, as special master, to take and state

> the accounts of William J. Craig, the late receiver in these cases, respectively; that in taking and stating such accounts the master inquire and report what receiver's certificates have been issued by the said receiver, to whom and upon what consideration and how, and by whom the same are now held, and to what extent such receiver's certificates constitute a just lien and charge upon the mortgaged premises, and upon what mortgaged premises the said certificates are chargeable, and to what extent, upon the respective lines or divisions of the railroad mortgaged."

It will be seen that this order was general in its character, and was intended to be and was only preparatory to a statement and settlement of the accounts of Receiver Craig, including among other things the certificates which, in the nature of the proceedings involving different divisions of the road, all embraced in the one receivership, must necessarily be apportioned and charged against the one or the other of the respective divisions.

There was evidently no purpose to attack or call in question the rights of any third party holders of certificates, or others, the only inquiry as to them being to ascertain who they were, so that they might in due time be paid off, and the certificates called in and cancelled. The "respective parties" who appeared as recited in the order, were evidently the complainant on the one hand and the receiver, Mr. Craig, on the other.

That this is the correct construction of the order is shown by a modification made December 21st, 1885, (page 112), which in direct terms explains that it is made "to the end that said special master, A. J. Ricks, may have full power to take and state the *accounts* of

the *receivership* of said property, from the beginning thereof to the end thereof, *as contemplated by the order of his appointment.*"

There seems to have been some order made December 31st, 1885, which counsel cannot find in this voluminous record.

On page 126 is an order made March 24th, 1886, after sale and confirmation and after the order made March 10th, (page 119,) for the receiver to turn over the property to Mr. Kneeland or his agent, Mr. Quigley.

This order of March 24th is recited as having been made "upon motion of complainant and the consent of W. J. Craig and John McNulta, receivers appponted herein," etc.

Attention is called to this order as showing the matter involved to be a settlement of the receivership accounts, and in this settlement "all proceedings, pleadings, exhibits, reports, evidence, orders and decrees" in any of the several courts in which the foreclosure proceedings had been carried on were to be considered. There is a special reservation at the end of the order that "This order shall not be deemed to ratify, validate or authorize any order or proceedings which is or would be invalid if made or had *without the consent or authority of this court*," but there is nothing whatever to indicate that up to that time any one had the idea that prior orders or decrees that had been entered or made *by the court* in any stage of the proceedings were to be, or could be attacked or *disregarded.* It was proper, and would in any case be proper, to inquire whether the *receiver* had in any case disregarded any such order or had assumed to act under any pretended order which had not in fact been made or assented to by the court.

The reference remained in this condition until May 25th, 1886, when these former orders were modified by the entry found on page 128 of the record.

This being the final and controlling order under which the master acted, it is, for the purpose of convenient reference, copied here in full:

> "And afterwards, to-wit, at the May term of said court, on the 25th day of May, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:
>
> "It is now ordered by the court that the orders of reference heretofore made herein to A. J. Ricks, special master, concerning claims filed in said cause and the accounts of Receiver Craig, be modified as follows:
>
> "The said A. J. Ricks, special master, is ordered and directed to report to the court from an inspection and examination of the receiver's and the company's books, accounts and papers at Toledo—
>
> "1. What receiver's certificates have been issued by said Receiver Craig, to whom such certificates were issued, for what consideration they were issued, when the indebtedness accrued upon which they are based, and whether any of said certificates were issued for a greater or less sum than was proper, and what, if any, of said certificates should be contested, giving dates and amounts of certificates.
>
> "2. What of the claims, if any, filed at Indianapolis on account of receiver's indebtedness (other than that represented by pay-rolls and certificates)

the *receivership* of said property, from the beginning thereof to the end thereof, *as contemplated by the order of his appointment.*"

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> "The said A. J. Ricks, special master, is ordered and directed to report to the court from an inspection and examination of the receiver's and the company's books, accounts and papers at Toledo—
>
> "1. What receiver's certificates have been issued by said Receiver Craig, to whom such certificates were issued, for what consideration they were issued, when the indebtedness accrued upon which they are based, and whether any of said certificates were issued for a greater or less sum than was proper, and what, if any, of said certificates should be contested, giving dates and amounts of certificates.
>
> "2. What of the claims, if any, filed at Indianapolis on account of receiver's indebtedness (other than that represented by pay-rolls and certificates)

> are obviously corrected, giving the amount due each claimant as the same appears on the receiver's books and accounts, stating what claims appear to be less or in excess of the correct amounts; what of such claims, if any, should be contested on the ground of fraud in their inception, excess in amounts, or for any other reason that may appear upon an examination of the receiver's and company's books and accounts at Toledo; also when the items making up said claims accrued."

There are two clear divisions made here in the matters as to which the examination is to be made. The second has no relation to these or any other certificates. Pay-rolls and certificates are expressly excepted. As to the claims covered by this second clause he is to examine and report what, if any, of these should be contested on the ground among others of fraud in their inception. This provision is not in the first clause.

It is under the first division that the right to make the investigation is claimed. But whatever may be claimed it clearly did not provide nor intend to provide for a *contest* of any certificates.

There was no provision then or at any time for bringing the holders of certificates before the court. No pleadings were filed or process issued against them. No provision was made for the filing of any pleadings by them. True the master was directed to report to whom and for what consideration they were issued, and whether any of them were issued for a greater or less sum than was proper, and he was ordered to report this from an inspection of the books, papers and accounts of the receiver and the company at Toledo. But that would be determined by an examination of the orders of

the court directing the issue and comparison with the records of the orders as issued. If these did not correspond then it would be the duty of the master to report that such certificates should be contested, and the court, upon the facts shown, should have provided for such a contest as should give the holder a day in court.

It was, however, claimed by counsel for appellant that these orders constitute a sort of "roving commission," under which the master was required to hear any evidence that could be obtained casting suspicion upon any of the original claims for the payment of which the certificates were issued under these decrees.

From May until in December of 1886, counsel for appellant were, from time to time, putting in evidence before the master which they claimed would tend to show that the amounts which the respective decrees ordered to be paid to some of the creditors were in excess of the amounts which were in fact due, and that by reason of some defects in the papers or proceedings, the liens claimed by them were invalid.

The holders of the great body of certificates in the meantime were resting upon their certificates. Mr. Dickson, representing a part of the Ritchie certificates, appeared and introduced the decree of the court, and objected to any evidence going behind it, and at different times after appeared to protest and enter objections, and Mr. Luce and some others produced lists of their certificates and testified as to their ownership.

It was only when the appellant had nearly reached the close of his evidence, covering some 250 pages of the printed record of oral testimony and an equal space in exhibits, that the larger holders, becoming alarmed, employed attorneys to look after their interest.

Counsel for the certificate holders thereupon made objection to certain depositions, which was sustained, and then further objected as follows, (page 588):

> "I also object to and move to rule from the record in this case all testimony in reference to the amounts due to the several parties to whom certificates were issued, or to any of them, at the time of the making by the court of the several decrees and orders upon which the certificates were issued, or the validity of the liens by them or either claimed upon the property of the railroad company or upon the stock of the Frankfort and State Line Railroad Company, for the reason that the court judicially passed upon and finally adjudicated all of such matters at the time of making said orders."

This objection and motion, together with others less important, being overruled, counsel proceeded by evidence drawn from such sources as they are able to reach at that length of time after the transactions, and in view of the fact that the holders of certificates were none of them parties to or in any way connected with such transactions, to show as nearly as they were able under the circumstances, the nature and character of the original claims and the circumstances attending the making of these several decrees.

THE MASTER'S REPORT.

The report of the master is found on pages 128-152 of the record.

The master construed the orders as requiring him to report, (page 129):

> "For what consideration they" (the certificates)

were issued, when the indebtedness accrued upon which they were based, whether any of said certificates were issued for a greater or less sum than was proper, and what if any of said certificates should be contested, giving dates and amounts of certificates."

He attaches as an answer to all the questions referred, excepting two, a schedule of the certificates by numbers and showing dates of issue, to whom issued, consideration, amounts, when accrued, division charged, and present ownership. This schedule is on pages 139-152.

The remaining questions on which he reports are:

1. Whether any of the certificates were issued for a greater or less sum than was proper.

2. What, if any of these should be contested?

On the first of these questions a history of the proceedings before him is given. He states that counsel for Mr. Kneeland claimed that the books of the railroad company would show that the certificates were issued for sums larger than the amounts due to the parties, gives a history of the taking of testimony of parties supposed to know the contents of the books, raising suspicions as to the amounts due the original creditors, but says that upon the finding and production of the books they "*failed to confirm such suspicions.*" The report closes on this point by finding "*that said certificates were not issued for a greater sum than was proper.*" (131.)

Upon the second of these questions, the master reports the substance of the receiver's petition filed November 14, 1883, and the making of the several decrees under which the certificates were issued. The report finds, (pages 133 and 134):

1. *As to the decree of January 28th, 1884:*

"Such proceedings were had under the receiver's petition that all parties in interest were duly represented and fully heard in court. The first mortgage bondholders were represented by their trustees as fully and fairly as such trustees are by law authorized to represent them and bind them by its action. After full hearing and consideration, the court made its decree of January 28th, 1884, finding the facts set forth in the receiver's petition, above briefly cited, to be true, and that it would be injurious to the interests of the stockholders, bondholders and creditors of said Toledo, Cincinnati and St. Louis Railroad Company, and more especially to that portion of the road between Kokomo and St. Louis, that the stock, the legal title of said railroad between Frankfort and Illinois state line, should be sold and the continuity of said line broken; and that it would be desirable and necessary for the protection of the rights and interests of all the said parties, and particularly the holders of bonds secured by said mortgage between Kokomo and East St. Louis, that the court should authorize the issue of receiver's certificates. The decree thereupon authorized the issue of certificates to all creditors who were parties to said trust agreement, and made them prior liens as heretofore stated."

2. *As to the Ritchie decree:*

"Subsequently separate proceedings were instituted by Ritchie and Company, also creditors of a character similar to those who signed the trust agreement. All persons parties to the other proceedings were made parties to said petition and

testimony offered, and full consideration had, and the court entered its decree allowing said certificates for the same reasons stated above."

3. *As to McPherson:*

"Separate proceedings were also instituted by Henry McPherson, who claimed a lien prior to the first mortgage bonds. His petition was filed and referred to a master and the testimony taken before him, and his report after appearances by all parties in interest, including the trustees for first mortgage bondholders, come on to be heard upon exceptions taken thereto. Upon said report, and after full hearing, the court authorized the receiver to issue certificates for the full amount of the claim, and make them a first lien upon the same portion of the road covered by the prior certificates allowed."

The master further reports:

"These certificates so authorized after judicial inquiry, where all parties interested were represented, and from which no appeal was taken or no review of proceedings instituted, have passed into the hands of present holders for due consideration without notice of any proposed contest, and passed to said holders, it is claimed, with the knowledge of the chairman of the bondholders' committee, who is now carrying forward this contest."

The report then gives a brief summary of facts as he now finds them upon the testimony before him with reference to each separate original claim.

The exceptions to the report are found on pages 153-158. Not to go over these in detail, it may be said by

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"Such proceedings were had under the receiver's petition that all parties in interest were duly represented and fully heard in court. The first mortgage bondholders were represented by their trustees as fully and fairly as such trustees are by law authorized to represent them and bind them by its action. After full hearing and consideration, the court made its decree of January 28th, 1884, finding the facts set forth in the receiver's petition, above briefly cited, to be true, and that it would be injurious to the interests of the stockholders, bondholders and creditors of said Toledo, Cincinnati and St. Louis Railroad Company, and more especially to that portion of the road between Kokomo and St. Louis, that the stock, the legal title of said railroad between Frankfort and Illinois state line, should be sold and the continuity of said line broken; and that it would be desirable and necessary for the protection of the rights and interests of all the said parties, and particularly the holders of bonds secured by said mortgage between Kokomo and East St. Louis, that the court should authorize the issue of receiver's certificates. The decree thereupon authorized the issue of certificates to all creditors who were parties to said trust agreement, and made them prior liens as heretofore stated."

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The exceptions to the report are found on pages 153-158. Not to go over these in detail, it may be said by

way of general remark, that they sustain the position taken that the effort of appellant's counsel is to *rehear* questions judicially determined by the decrees ordering the issue of the certificates, without making any direct attack on the decrees.

1. The exceptions are mainly directed to findings as to the character and amounts due upon the original claims for the payment of which they were ordered to be issued.

2. There is *no exception to the findings of the master that the decree of January 29th, the Ritchie and the McPherson decrees, had all been made upon full hearing before the court, and that all persons interested were parties to these respective decrees. No exception was taken to the finding of the master that the amounts of the Ritchie and McPherson claims had been fully adjudicated.*

On the other hand, the exceptions are largely argumentative, complaining that the master, by misconstruing the order of reference, has prevented a full investigation, and that he has not fully reported the facts connected with the original claims; that the evidence showed a less amount due Ritchie; that there were mistakes in the computation of the McPherson claim; that there were defects in the liens claimed by the creditors; that the Frankfort and State Line road was not built upon the proper line, etc., all being *matters of fact*, existing before the decrees were made, and which were necessarily raised, or which might have been raised, on these hearings before the court, at the the time of the entry of the several decrees.

All these matters having been once in controversy, the parties and their privies are restrained from litigat-

ing them anew, unless it were done by some direct action in equity, by appeal, writ of error, or in some other legal method.

Wells, Res Adjudicata, sections 2, 6, 9, etc.

Whether the appellant is considered as a party to the proceedings, or as a purchaser holding under the sale made in the action, he cannot contradict the record. It is "of uncontrollable verity," and even although evidence should be afterward discovered which would have produced a wholly different result, it is not permissable to show it for the reason that otherwise matters might never be set at rest.

Freeman on Judgment, sections 286, 334, and cases cited.

That relief in equity might be granted in a proper case is admitted, but where such a suit is brought it must be shown:

1. That actual, positive fraud has been practiced by the prevailing party.

2. That the conduct of the party seeking the relief has not been such as to deprive him of his right.

3. That the relief can be given him with due regard to the rights of others.

Kerr on Fraud, page 352, American Edition.

"Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the court to set aside a decree."

Kerr on Fraud, page 353.

The principles under which this relief may be granted are so fully and clearly stated in the opinion of this court as delivered by Mr. Justice Miller in *United States vs. Throckmorton*, 98 U. S., 61, 65, *etc.*, that citation of other authority is wholly unnecessary. Further discussion as to this is also wholly unnecessary, for the reason that *no attempt* is made to make a case of *fraud* against any of the parties to either of these decrees.

There is a further principle applicable here if any such relief were asked.

In cases where the trustee is in court representing beneficiaries, the beneficiaries are equally bound; and in order to attack the decree it is necessary for the attacking parties to show fraud or collusion between the *trustee and the adversary parties.*

Kerrison vs. Stuart, 93 U. S. 155, 160.
Shaw vs. R. R. Co., 100 U. S. 611.

In support of the position taken that the record of these decrees is unimpeached and unimpeachable, it may be stated by way of summary that the examination of the record in this case will show:

1. That there is no allegation of fraud as against the creditors or either of them in whose favor the certificates were ordered to be issued by any pleading or in any other form whatever.

2. There is no attack upon these decrees or either of them by way of allegation or exception involving any question of fraud.

3. There is no charge against the creditors or either of them, or the trustee for the bondholders or their attorneys, of any collusion between them, or either of them, in the entry of either of these decrees.

4. If any of such charge or imputation were made against the creditors, or either of them, or against any one representing the bondholders, the record in this this case is *utterly barren* of any evidence even *tending* to sustain such a charge.

It may be further properly said that the facts involved have been so many times and so fully investigated, and with such full opportunity for investigation, that it would seem to be wholly unnecessary to enter here into a discussion in detail of the evidence spread out in this voluminous record relating to the original claims for which these certificates were issued. The investigation of these facts has been made separately at the time of rendering each of these several decrees before the Circuit Court, Judge Drummond presiding; before the masters, to whom especially the claims of Ritchie and McPherson were referred; the bondholders in these investigations being represented by the trustee named in the mortgage, the attorneys for the trustee, by the bondholders' committees, and the counsel for such committees.

Notwithstanding these investigations and the decisions made under them, counsel for the appellant here have been given months of time upon the hearing before the master, Mr. Ricks (now District Judge), to procure and produce evidence against these claims, and upon this evidence he has made his finding of facts after full argument before him by counsel, and made his report to Circuit Court.

This report has been confirmed by the Circuit Court upon exceptions taken by appellant's counsel, and after full argument before the court, Judge Gresham presiding, these exceptions have been overruled, and the de-

cree of the court overruling the exceptions, confirming the report and ordering the payment of these certificates, has been made.

It is submitted to this court that, after such full and repeated examinations and determinations, there can be no reason now why Mr. Kneeland or his counsel should insist, or even suggest, that this court should either make or attempt to have made any other or further investigation of these facts, even if it were within the province of proper judicial inquiry to have such further examination now made.

In the nature of things it would not be possible for this court, or for any other court or master, to be placed in as good position to ascertain and pass upon the true facts [illegible] than have been the courts and masters that have already passed upon them. If there is ever to be an end to inquiry, it would seem that that end has been reached in this case.

FINALLY.

It is respectfully submitted that the decree providing for the payment of these certificates is a mere administrative order carrying into execution the prior decrees of the court; that it ought not to be in any way disturbed, but that either by a dismissal of the appeal or by an affirmance of this order and decree, it should speedily be put in course of enforcement.

CHARLES PRATT,
of Counsel.

TOLEDO, Sept. 1891.

Office Supreme Court, U. S.
FILED,
OCT 15 1891
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 39.

SYLVESTER H. KNEELAND, APPELLANT,

vs.

C. L. LUCE & CO., JOHN T. NEWTON, NATIONAL STATE BANK OF MT. PLEASANT, IOWA, ET AL., APPELLEES.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEES.

W. I. BABB,
Of Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR APPELLEES.

Counsel for appellants in their brief argue this case as though this was an application by the original holders of the receiver's certificates involved in this case to obtain an order for their issue and ignore the controlling questions involved in this appeal.

In doing this there are, however, so many misstatement of facts and omission of other important facts that we have thought best to attempt a correction of a few of them.

I.

Statement of Facts.

The Toledo, Cincinnati and St. Louis Railroad Co. was organized about June, 1881, and was formed by the consolidation of a number of local roads which were then engaged in building lines of narrow-gauge railroad in Indiana and Illinois, between Kokomo, Indiana, and East St. Louis.

A construction company known as the "Western Construction Company" had prior to this, in 1880, entered into contracts with these several local roads for their construction, whereby they were to receive for such work all the stock and bonds of the several roads, and in some cases, in addition to that, certain local aid which had been raised along the respective lines. These lines of road had all been located and work was in progress when, in the summer of 1881, it was concluded that the stock and bonds would sell to a much better advantage if a continuous line of road should be organized and the several local organizations merged in it and the bonds and stock of the consolidated line substituted for those of the numerous local organizations, and it was with that view that the Toledo, Cincinnati and St. Louis Railroad Company was organized.

The stock of all these local companies, except the Frankfort and State Line Railroad Company, was exchanged for the stock of the new company, and all except this company became merged into and consolidated with it.

It will be necessary to briefly note the relation of the Frankfort and State Line Railroad Company to this new organization and its history, as it is the key to the issue of the certificates involved in this controversy.

The Frankfort and State Line Railroad Company was organized in 1874 for the purpose of building a line of railroad from Frankfort, Indiana, westward to the State line. About that time they located a line in part and built a

broad-gauge road from Frankfort west to near Clark's Hill, in Indiana, a distance of about 11 miles, where the work ceased. On August 10th, 1880, they entered into a contract with the Western Construction Company for the building of their line from Frankfort, Indiana, west to the State line, and described as running westwardly through the counties of Clinton, Tippecanoe, Montgomery, Fountain, and Vermillion, to the State line of Indiana, at a point a little southwest of Eugene, Indiana. The road was to be a narrow-gauge road and they were to receive the 11 miles constructed, on which was a mortgage, and to receive for the construction of the remainder $4,000 per mile in local-aid taxes and subscriptions, which had been voted and raised; $10,000 per mile in first-mortgage bonds, and all the stock of the road except what was necessary to deliver to tax-payers for local aid, the total stock being $2,000,000 and the amount to be reserved from this for the parties raising local aid being $200,000, the length of the line, including the 11 miles previously constructed, being 67 miles.

On February 22, 1881, the Western Construction Company made a contract with Barnes & Co., which, on same day, with their consent, was assigned to the Iowa Construction Company, for the grading of this line, and also some other work in Illinois. The line was located early in the spring of 1881 by the engineer of the Western Construction Company, and the work was commenced at once vigorously, and the grading largely done, when on June 10, 1881, the Western Construction Company entered into a contract with the Toledo, Cincinnati and St. Louis Railroad Company for the construction of a line of narrow-gauge railroad, which was, so far as this line is concerned, described as running west from Frankfort through the counties of Clinton, Tippecanoe, Montgomery, Fountain, and Vermillion to a point on the State line southwest from Eugene, Indiana, and for which they were to receive the bonds and stock of the T., C. & St. L. R. R. Co.

It was not the intention, as shown by the evidence, to construct two lines of road, but the object was to ultimately consolidate the Frankfort and State Line Railroad Company with the new organization and turn it over to the new company, and thus form the continuous line. This was not then done, as was the case with all the other local roads, for the reason, as shown fully by the testimony, that they were advised by their counsel that if that was effected the local taxes voted in aid of it, and local subscriptions made, all of which were so made and voted to the Frankfort and State Line Railroad Company, would be void under the Indiana laws. For that reason it was determined not to merge the two lines at that time, but to keep up the two separate organizations, the two forming the continuous line. The amount of this local tax and subscription is shown to have been over $170,000.

The construction of the Frankfort and State Line road was completed in 1881 or in the early part of the winter of 1882, and much of the work was then done on the whole of the line to East St. Louis, but the fiscal agents of the Western Construction Company in New York, Geo. W. Ballou & Co., were unable to sell the bonds and stock of the new line to go ahead with the work, and the Western Construction Company were consequently unable to proceed farther, and early in the spring of 1882 a syndicate was formed in Boston which was known as the Delphos Trust, which, after examining the line of road, also the securities undisposed of, and receiving estimates as to the amount required to complete it, agreed to take all of the bonds and stock then unsold and pay an amount equal to the estimate required to complete the road; and one Daniel Ahl was appointed as their agent to see to completing the work and disbursing the money. Under this arrangement all the securities then unsold were turned over by the Western Construction Company to it, except the stock of the Frankfort and State Line Railroad Company.

At the time of the making of this arrangement the Western Construction Company were entitled to the whole of the stock of the Frankfort and State Line Railroad Company, they having completed their contract with that company, and they actually had at that time $1,000,000 of said stock, and soon after received the remaining $800,000 of it, and it was arranged between the Delphos Trust and the Western Construction Company that W. J. Craig, the president of the latter, should hold the said $1,800,000 of stock until all its debts due to its subcontractors were paid.

These debts not being paid, the subcontractors filed their several claims for mechanic's lien at the times and places shown in the master's report, and commenced their several suits to foreclose these liens, making the Western Construction Company and the Toledo, Cincinnati and St. Louis Railroad Company parties to said suits, which suits were pending March 20, 1883.

The road was completed during the year 1882, but these debts due the subcontractors of the Western Construction Company were not paid, and while pushing their several claims under mechanic's lien these subcontractors, who are the creditors to whom the receiver's certificates in question were afterwards issued, learned of the fact of this stock of the Frankfort and State Line Railroad Company being held by the president of the construction company to secure the payment of their claims, and they were about to commence proceedings to attach this stock when an arrangement was made by and between said creditors and the Toledo, Cincinnati and St. Louis Railroad Company, acting by its officers and executive committee; the Frankfort and State Line Railroad Company, the Western Construction Company, and the American Loan and Trust Company of Boston, whereby the said railroad company gave its notes to said creditors for the amount of their several claims, payable in installments, the last running for a year. To secure the payment of same the stock of the Frankfort and State Line

Railroad Company held by the Western Construction Company was deposited with the American Loan and Trust Company of Boston as collateral, and provisions were made for its sale in case of default in their payment, and upon the payment of those notes this stock was to pass to the Toledo, Cincinnati and St. Louis Railroad Company, and in the meantime the creditors were not to push their mechanic-lien suits.

This agreement is attached to the petition of Receiver Dwight, under which the certificates in question were issued, and will be found on pages 15 to 17 of Record, and is incorporated in full in this brief in connection with the petition of Receiver Dwight.

At the same time the Toledo, Cincinnati and St. Louis Railroad Company issued its notes to the said several creditors for the amount so owing them and so secured, the notes falling due in 6, 8, 10, and 12 months after date. This contract secures all the creditors to whom the receiver's certificates in question were issued except W. F. Ritchie and Henry McPherson.

The reasons, as shown by the evidence, for the railroad assuming these debts were that they became alarmed and were fearful that by the seizure and sale of the Frankfort and State Line stock it would get into hostile hands and they would lose a link of 67 miles in their line of road, and in addition to this they were anxious to stay the several suits under the mechanic-lien foreclosures commenced by the creditors for the reason they were fearful that if pressed at that time they might be compelled to go into the hands of a receiver, and thought if they could tide affairs over until after harvest the road would begin to pay so that they might avoid a receivership.

The testimony of Henry D. Hyde, then general counsel for the railroad company, on pages 425 to 427 of printed record, shows this fact very clearly.

II.

Who built the line of railroad from Frankfort to the west line of the State of Indiana?

The first serious misstatement of fact by appellants is when they state that the Western Construction Company never built that line of road under their contract with the Frankfort and State Line Railroad Company, but that it was built under their contract with the Toledo, Cincinnati and St. Louis Railroad Company.

The contract of the Western Construction Company to build that line of road was made with the Frankfort and State Line Railroad Company on August 31, 1880, nearly one year before the Toledo, Cincinnati and St. Louis Railroad Company had even an existence, it being formed on June 9, 1881. This contract is set out on pages 236–'9 of the printed record.

On June 10, 1881, as we have stated, the Western Construction Company made a contract to build a line of road for the Toledo, Cincinnati and St. Louis Railroad Company from Kokomo, Indiana, to St. Louis and expected at some time in the future, when it received the stock of the Frankfort and State Line road, which it was to receive for the construction of the road, and collected the local aid voted to that line, to consolidate it with the other part of the line to fulfil its contract with the Toledo, Cincinnati and St. Louis Railroad Company, but it in fact built the line for the Frankfort and State Line Company and said organization held the legal title to said road in 1883, whatever equities the other road may have had.

The amount of local aid voted and raised for the Frankfort and State Line road by the people along its line is set out in detail on page 931 of Record and consisted of $139,650 in taxes voted to it and $48,700 in private subscriptions, making in all $188,350.

The evidence clearly shows that the road was largely built aside from the iron before the T., C. & St. L. was even organized.

On pages 227 and 228 of printed record W. J. Craig, the president of the Western Construction Company, who was building said line, says:

Q. Was the construction of the Frankfort and State Line road completed by the Western Construction Company?
A. Yes, sir.
Q. You may state whether the Western Construction Company received the stock and bonds provided for in the contract with the company, being the contract marked "Exhibit A," the contract with the Frankfort and State Line.
A. It did receive the stock, but did not receive the bonds.

Again, on page 233, he says:

Q. How far had you progressed with the completion of the Frankfort and State Line road at the time you entered into the contract with the T., C. & St. L. road, which has been put in evidence here as "Exhibit B"?
A. We had not laid any iron at that date, the 9th of June, when the contract was made. We had done a considerable amount of grubbing, clearing, and grading and timber work; got out a good many ties.
Q. Had you been bridging any?
A. Some.

He also gives a full statement to same effect on pages 548 to 550 of Record.

On page 247 the same witness states:

Q. When you finished the construction of the Frankfort and State Line road you may state whether there was any part of it left incomplete and whether the T., C. & St. L. afterwards completed it.
A. The T., C. & St. L. never completed any road. My recollection is that before I left the work the Frankfort and State Line road was completed. There certainly was less than a mile of track to lay, and I think it was all laid. I am not quite sure whether Fall Creek bridge was complete before I left the work.

As showing the same fact, the evidence shows that practically all the right of way was secured by the Frankfort and State Line road and in its name.

The witness Craig, on page 247, in answer to question 29, shows this. The testimony of James H. Rice, the secretary of the Frankfort and State Line road, who secured the right of way, gives this quite full. In answer to question 5 he says:

"Well, all the right of way had been procured prior to our going there and settled for from Frankfort to Clark's Hill; and prior to the lease of the Frankfort and State Line to the T., C. & St. L. Company we had secured all the right of way that was not litigated in the name of the Frankfort and State Line Company."

This fact, however, is shown beyond cavil by a list of all of the deeds for right for this line of road, which is set out on pages 1062 to 1066 of printed record, being an exhibit to testimony of Horton, the chief engineer. This list gives the dates of the deeds, the names of the grantors and grantees, and when recorded. It shows that there were in all 257 right-of-way deeds on this line, and that only three were taken in name of T., C. & St. L. road, and these long after its construction. The other deeds, except two, were taken in the name of the Frankfort and State Line Company.

Not only is the fact that this line was built by the construction company for the Frankfort and State Line road shown by these things, but by the further fact that the line, when built, was leased by the T., C. & St. L. Co. from the Frankfort and State Line Company, and so held until the appointment of the receiver in this case.

The lease is set out on pages 243 and 244 of the Record. True this contract is not formally signed, but the facts concerning it are fully shown by A. A. Thomas, the general attorney of the T., C. & St. L. R. R. Co. and president of the

Frankfort and State Line road. On this point he says in his testimony on pages 249 and 250:

A. The following is the resolution which was passed at that time, as shown by the record:

"Resolved by the board of directors of the Frankfort and State Line R. R. Co., That the president and secretary of this company be authorized to execute to the Toledo, Cincinnati and St. Louis R. R. Co. an operating contract and lease of its real estate, containing such provisions as said president, by executing, shall approve and adopt; which resolution was unanimously adopted."

(Date, April 20th, 1882.)

The paper here present, which is marked Exhibit C in Craig's deposition, is either the original or a copy of the paper executed in pursuance of that authority. I wrote it—that is, my recollection is T. A. Phillips, general manager of the T., C. & St. L., signed it, and I signed it on behalf of the Frankfort and State Line road.

We agreed to it and carried it out. It was in pursuance of that contract the Frankfort and State Line road was put in possession of the Toledo, Cincinnati and St. Louis Railroad Co. long before the receivership and remained in its possession up to the time of its dissolution. At this time the Frankfort and State Line road was practically completed by the Western Construction Co. It was very anxious to turn it over to the T., C. & St. L. R. R. to take possession of it and operate it. For quite a time T. A. Phillips, the general manager of the T., C. and St. L., declined to take it. More work was compelled to be done on it to make it in proper shape.

At last it was agreed that he would take it. This resolution was passed by the board of directors of the State Line road, and I was directed by the president of the T., C. & St. L. to prepare this contract. My recollection is that it was signed by the general manager of the T., C. & St. L. and myself. At any rate, we agreed on its terms; we agreed on that as the contract, and the State Line railroad was turned over to T. A. Phillips, the general manager of the T., C. & St. L., in pursuance of it. Let me add, it remained in his possession, or rather its possession, operating the T., C. & St. L., up to the time of the application for the receivership. These facts and this contract were set forth in the bill filed at Chi-

cago, on which the original appointment of a receiver was made. The receiver was Mr. Dwight. Receiver Dwight took possession of the Frankfort and State Line R. R. in pursuance of that order, and he or his successor *have* since been in possession. I was surprised when I saw Craig's testimony, saying that that paper was never signed. My recollection is that it was.

Not only are these things so, but it is also conclusively settled under the decree in the foreclosure suit under which the appellant in this case purchased and under which he holds title to-day.

In that case the Frankfort and State Line Company was made one of the defendants by the trustees of the bondholders when they filed their bill to foreclose, and it, with some of its stockholders who intervened, contested the right of the bondholders to any lien upon that part of the line of road, and a large amount of evidence was taken, the bondholders being represented not only by the trustees and their attorneys, but also by the attorneys of the committee of bondholders who had intervened, and after full hearing the court, in its final decree in the case and under which the sale was made, finds as follows, as shown on page 104 of Record:

"Third. The court further finds that so much of said line of railroad described in said aforesaid mortgage as lies between the city of Frankfort and the line dividing the States of Indiana and Illinois, being about sixty-seven miles in length, was constructed by a company under a written contract entered into between it and said Frankfort and State Line Railroad Company on the 31st of August, 1880, except $11\frac{3}{10}$ miles which had heretofore been built."

The court then goes on, recites various other facts and the issue of the receiver's certificates, whereby the stock of said Frankfort and State Line road had been secured for the bondholders, and finds that they have no legal lien upon said line, but an equitable lien, and directs said stock to be

turned over to the purchaser at the sale to make a title to this portion of the line.

In view of all these facts and estoppels, how can appellants say that the legal title to this part of the line of road was not held by the Frankfort and State Line Company?

III.

Was the court deceived as to the true condition of affairs when it issued the receiver's certificates in question, and were the bondholders and their trustees also deceived when they consented to their issue?

This is the strangest claim that could be made in this case. There is absolutely no proof to support it.

The petition filed by the receiver, E. E. Dwight, upon which these certificates were issued, states every material fact necessary to a full understanding of the case.

It states all the material facts as accurately and as fully as your honors could find them if you should read every item of testimony in the 1264 pages of record in this case. It states them substantially as was found by the court in its final decree under which the appellant claims title to-day, which decree was based upon the same evidence in large part that is contained in this record--the evidence in a contest between the trustees of the bondholders in the foreclosure suit and the Frankfort and State Line Railroad Company, which was a party defendant.

The evidence in the original foreclosure case has been all introduced in this case, the findings of the court in its decree being shown on pages 104 to 107 of Record.

The petition of the receiver, upon which the certificates were issued, is as follows:

Circuit Court of the United States, Southern District of Indiana.

GRENVILLE D. BRAMAN
vs.
TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et al.*

Petition of the Receiver Regarding the Frankfort and State Line Railroad Company Stock.

Edward E. Dwight, receiver herein, respectfully represents that prior and subsequent to August 31, 1880, the Frankfort and State Line Railroad Company was and is a corporation duly organized and existing under the laws of the State of Indiana for the purpose of constructing and operating a railroad from a point in the city of Frankfort, in the county of Clinton, in the State of Indiana, southwardly to a point on the line between the States of Indiana and Illinois and near the town of Eugene, in the State of Illinois, and being a distance of about sixty (60) miles.

Said receiver represents that on August 31st, 1880, said Frankfort and State Line Railroad Company duly entered into a contract with the Western Construction Company, a corporation duly organized under the laws of the State of Ohio for this and kindred purposes, whereby said construction company agreed to construct said Frankfort and State Line Railroad Company's road between its said termini, and whereby, in consideration whereof, said Frankfort and State Line Railroad Company agreed to execute and issue to said Western Construction Company and under its direction mortgage bonds at the rate of ten thousand dollars per mile of railroad, bearing seven per cent. interest, payable semi-annually, and which should be a first lien upon all of the railroad and personal property of said Frankfort and State Line Railroad Company, and also to so deliver to said construction company paid-up certificates for all the capital stock of said Frankfort and State Line Railroad Company, provided that said construction company should therefrom pay and deliver to third parties such shares of said capital stock as should be due such third parties by subscription or for tax or for local aid.

Said receiver represents that thereafter said contract was

substantially complied with by said Western Construction Company and said railroad so built and said stock so delivered.

From the first and during all of said proceedings the intent and purpose and understanding of all of said parties was that said railroad should be and become a part of said Toledo, Cincinnati and St. Louis railroad and said corporations consolidated for that purpose.

Said receiver represents that said separate mortgage of ten thousand dollars per mile was never asked for by said construction company, nor in fact never executed by said Frankfort and State Line Railroad Company, but that in lieu thereof said Western Construction Company, having like contracts with the Toledo, Cincinnati and St. Louis Railroad Company to build and perfect a railroad from Kokomo, in the State of Indiana, to East St. Louis, caused said Toledo, Cincinnati and St. Louis Railroad Company to execute thereon, and from Kokomo, Indiana, to East St. Louis, Illinois, its said mortgages set forth in the petition of the plaintiff in this case, and in chief part with the proceeds of the sale of said mortgage in chief part actually built said Frankfort and State Line railroad.

Said receiver represents that for many months past said Frankfort and State Line railroad has been, in fact, a part of the line of said Toledo, Cincinnati and St. Louis railroad and a necessary and connecting portion of the same and actually in its possession and operated by it, and so was at the time of the filing of said plaintiff's bill herein, and so became and is now in the possession of this court through its said receiver.

Said receiver represents that in the construction of said railroad extending from Kokomo to said Illinois line and in the construction of said further portions of said road extending to East St. Louis, being all and only that line of railroad covered by said Toledo, Cincinnati and St. Louis railroad mortgage, certain indebtedness remained due to certain contractors for materials furnished or labor done thereon, for which said contractors had or claimed certain liens and had begun or were about commencing suits thereon against said Toledo, Cincinnati and St. Louis Railroad Company, and said capital stock of said Frankfort and State Line Railroad Company, being held and reserved back from the payment thereof, so far as said Western Construction

Company was liable thereon, all of said parties in interest to wit:—

The Toledo, Cincinnati and St. Louis Railroad Company, principal defendant herein, party of the first part, and said Frankfort and State Line Railroad Company, party of the second part, and said Western Construction Company, party of the third part, and the American Loan and Trust Company of Boston, a corporation organized under the laws of the State of Massachusetts, party of the fourth part, and certain of said contractors as did suggest same on their respective parts—did, for valuable and sufficient considerations, duly make and execute the following agreement:

Whereas the Western Construction Company *extend* into a contract with the Frankfort and State Line Railroad Company, which has been substantially performed, whereby said construction company was to receive the whole of the capital stock of said Frankfort and State Line Railroad Company, which was two million dollars, par value, less what might be required to be issued for subscriptions by other parties and for tax and local aid; and

Whereas said State Line railroad was intended to be a part of the line of the Toledo, Cincinnati and St. Louis railroad extending from Kokomo, Indiana, to East St. Louis, Illinois, and has been in fact built by the proceeds of the Toledo, Cincinnati and St. Louis railroad mortgage laid upon its line between the points aforesaid; and

Whereas said Western Construction Company, for value, agreed to sell and assign its right and title to said stock to the trustees of the Delphos trust for sole purpose of effecting a consolidation of said Frankfort and State Line Railroad Company with said Toledo, Cincinnati and St. Louis Company, and of then turning the said stock into said Toledo, Cincinnati and St. Louis Railroad Company in full settlement of all construction contracts; and

Whereas, as a condition of said sale and assignment of said stock by said Western Construction Company, it was agreed that the same should be held back and reserved and not be deliverable until certain debts and obligations of said Western Construction Company contracted in building said railroad should be paid and said Western Construction Company released therefrom; and

Whereas it is agreed that a full and true schedule — such

debts and obligations is hereto annexed, marked "A," and made party of this agreement:

Now, therefore, the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Ohio, Indiana, and Illinois, party of the first part hereto; the said Frankfort and State Line Railroad Company, party of the second part; said Western Construction Company, party of the third part; the American Loan and Trust Company of Boston, party of the fourth part, and such of said creditors of said Western Construction Company embraced in said Schedule "A" as signed this instrument on their respective parts hereto, and in consideration of the mutual obligations herein, do make this agreement:

Item 1. Said Toledo, Cincinnati and St. Louis Railroad Company, party of the first part, hereby assumes of said debts and obligations set forth in said Schedule "A" the obligations specified in Schedule "B," which schedule is made a part hereof and is annexed hereto, and agrees to pay the same as set forth in said Schedule "B."

Item 2. Said Frankfort and State Line Railroad Company hereby admits full and sufficient performance of contract for its construction with said Western Construction Company, and hereby agrees to deliver forthwith, so far as may be, the balance of its capital stock due under said contract, to wit, the sum of eighteen hundred thousand dollars ($1,800,000), par value, of its said stock.

Item 3. Said Western Construction Company hereby deliver to said American Loan and Trust Company said eighteen hundred thousand dollars ($1,800,000), par value, of the capital stock of said Frankfort and State Line Railroad Company in and for the following trust:

Said loan and trust company shall hold said stock as security for the payment by said party of the first part of the debts set forth and at the times specified in said Schedule "B." Should the same be so paid, then said trust shall have been executed, and said stock shall be delivered by said trust company to Elmer P. Howe or, in the event of his death, to the then chairman of the executive committee of said Toledo, Cincinnati and St. Louis Railroad Company and freed from any further duty or liability on the part of said trust company in relation thereto.

Should any of the said debts specified in Schedule B not be punctually paid as therein stipulated, all of the said debts

shall at once become due, and then said trust company may, and on written demand of any of said creditors shall, after thirty days' notice to said party of the first part of its intention so to do, sell the same or so much thereof as shall be necessary to pay all the remaining or unpaid indebtedness specified in said Schedule "B" for such and apply the same so received, after paying the necessary expenses of said sale, in payment of said indebtedness.

Such sale shall be at public auction after thirty days' notice advertised in the Boston Journal and in the Missouri Republican of St. Louis, Missouri, a copy of either of said papers containing such notice to be mailed by said trustee twenty days previous to such sale to each of said creditors named in Schedule "B" at the addresses therein given.

Item 4. Said Frankfort and State Line Railroad Company shall, after satisfying as soon as possible the legal demands of subscribers to its stock and for local aid and tax received or provided in its contract with the said Western Construction Company, deliver over the remaining balance of its said stock to said trust company, to be held on the trusts set forth in this instrument the same as the stock previously delivered.

Item 5. Said creditors specified in Schedule "B" agree to accept said sums therein stated and payable at the times therein specified in full settlement and payment of all amounts due under their contracts, and on other payments of the same in full to execute releases for the same and of all other claims and demands of every notice and description to said parties of the first, second, third, and fourth parts hereto, and to Daniel Ahl, Jr., and to receive from said parties like release.

Item 6. No new suits shall be begun by any of said creditors on said contracts or otherwise upon any of the debts specified in Schedule "B" hereof against any of the parties hereto until default in same payment provided for in said schedule, and until the like default no further proceedings shall be had in any pending suit by any party hereto, but the same shall be continued and remain *in statu quo*, nor shall anything herein be held to release or defeat any existing lien, nor shall the execution or acceptance of any note for any debt specified in Schedule "B" by any creditor named therein be an extinguishment of the original debt until the same shall be paid.

Item 7. It is agreed that the legal title to said stock be placed in said trustee, and said stock shall not be rated until said debts in Schedule "B" are paid in full, except for the purpose of keeping up the organization of said company by the election of directors.

Item 8. This agreement to apply to and include only such of said creditors specified in Schedule "A" *or* shall sign the same within ninety days from March 20th, 1883; and the signature of said trust company hereto shall bind said trust company only to an acceptance of said trust and the obligation to perform its conditions.

Witness our hands this twentieth day of March, A. D. 1883.

THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY,
By HERBERT STEWARD, *Treasurer.*
AMERICAN LOAN & TRUST COMPANY,
By N. W. JORDAN, *Actuary.*
THE WESTERN CONSTRUCTION CO.,
By W. J. CRAIG, *President.*
THE FRANKFORT AND STATE LINE RAILROAD COMPANY,
By A. A. THOMAS, *President.*
PATRICK DOWLING,
By JOSEPH DICKSON, *Attorney.*
H. S. HOPKINS & CO.
COCHRAN & BROWN.
THE IOWA CONSTRUCTION COMPANY,
By C. H. SMITH, *President.*
BEESON & HAMMOND,
By RICHARD OLNEY,
By Power of Attorney on File with American Loan and Trust Company.

SCHEDULE "A."

List of Claims.

H. S. Hopkins & Co.	$33,861 25
Cochran & Brown	17,790 73

Also a claim for rebuilding "Okair trestle."

If it shall, within the time provided in the foregoing agreement, be determined that any sum is due on this claim, or if within such time any sum shall be agreed upon as due by way of compromise, such sum shall be entered against this claim in this schedule and transferred to Schedule "B" hereof..... $4,500 00
W. F. Richie & Co..... 1,138 90

Also a claim for ties and lumber used, which have never been estimated. When the amounts due on this claim shall have been agreed upon or determined, if so agreed upon or determined within the time in that behalf provided in the foregoing agreement, it shall be entered against this claim in this schedule and transferred to Schedule "B" hereof.

Kapp & Co..... $1,924 42

Amount guaranteed correct by W. J. Craig. If found incorrect it shall be corrected.

Patrick Dowling.

A claim for grading, excavating, track-laying, extra work, and damages, when the amount due on this claim shall have been determined and agreed upon. If so determined as agreed upon within the time in that behalf provided in the foregoing agreement, it shall be entered against this claim in this schedule and transferred to Schedule "B" hereof.

The Iowa Construction Company..... $37,500 00
Beeson & Hammond..... 12,940 62
Patrick Dowling..... 3,750 00

SCHEDULE "B."

H. S. Hopkins & Co.—Amount of Debt.

Principal..... $33,861 25
Interest..... 1,392 90

$35,254 15

Settlement.

Cash	$3,386 12
Note, April 3, 1883, 6 inst.	7,851 40
" " 8 "	7,929 20
" " 10 "	8,002 63
" " 12 "	8,084 80
	$35,254 15

Cochran & Brown—Amount of Debt.

Principal	$22,290 73
Interest	927 10
	$23,217 83

Settlement.

Cash	$2,229 07
Note, April 3, 1883, 6 months	5,169 94
" " 8 "	5,221 44
" " 10 "	5,272 94
" " 12 "	5,324 44
	$23,217 83

W. F. Ritchie & Co.
Kapp & Co., Bluffton, Ind.

Iowa Construction Company, Mt. Pleasant, Iowa—amount of debt	$37,500 00
Interest	1,535 07
	$39,035 07

Settlement.

Cash	$3,750 00
Note, April 3, 1883, 6 months	8,694 33
" " 8 "	8,797 21
" " 10 "	8,863 59
" " 12 "	2,121 00
" " 12 "	1,484 70
" " 12 "	1,100 26
" " 12 "	1,060 50
" " 12 "	1,060 50
" " 12 "	1,060 50
" " 12 "	1,060 50
	39,035 07

Patrick Dowling—Amount of Debt.

Principal	$3,750 00
Interest	151 84
	3,901 84

Settlement.

Cash	$375 00
Note, 6 months	386 25
" 6 "	482 81
" 8 "	877 50
" 10 "	885 93
" 12 "	894 35
	3,901 84

Beeson & Hammond, by Richard Olney, attorney, Kosciusko, Mississippi—amount of debt	$12,940 62
Interest, $\frac{1}{12}$ | 33	204 16
$\frac{4}{3}$ | 83 @ 8%.	
Interest on note	532 34
	13,677 12

Settlement.

Cash	$1,314 48
Note, April 3, 6 months	3,046 30
" " 8 "	3,075 87
" " 10 "	3,105 45
" " 12 "	3,135 02
	13,677 20

Said receiver represents that he is informed and believes that said Toledo, Cincinnati and St. Louis Railroad Company, principal defendant herein, is the real owner of said Frankfort and State Line Railroad Company's stock, subject, however, to the terms of said trust agreement; that said Elmer P. Howe has or claims no interest therein whatever, but that the same was to be delivered to him in certain contingencies only for the purpose of holding the same and of finally causing the consolidation of said Frankfort and State Line Company, whereby said Toledo, Cincinnati and St. Louis mortgages covering said road from Kokomo to East

St. Louis might be ratified and made complete and valid liens.

Said receiver represents that a portion of said indebtedness set forth in said schedules secured by said pledge of said stock is overdue and has not been paid; that said creditors secured by said trust agreement duly demanded of said trust company the said stock be sold according to the terms thereof, and that said trust company be duly notified — said The Toledo, Cincinnati and St. Louis Railroad Company that it will on November 21st, 1883, or at some adjourned and later date, at the office of Henshaw and Company, 57 State street, Boston, Massachusetts, sell at public auction, for cash, and pursuant to the provisions of said trust agreement, said capital stock of the Frankfort and State Line Railroad Company, amounting at par value to the sum of eighteen hundred thousand dollars, or so much thereof as shall be necessary to pay the indebtedness specified in Schedule "B" annexed to said trust agreement and remaining unpaid.

Said receiver represents that it is claimed by the holders of the bonds secured by said mortgage on said railroad extending from Kokomo to East St. Louis that said mortgage is at least an equitable lien upon said Frankfort and State Line railroad, but that said claim is disputed by certain of said creditors; that it would be ruinous to the interests of the stockholders, bondholders, and creditors of said Toledo, Cincinnati and St. Louis Railroad Company and to the interests of the public so far as interested therein or served thereby that by the sale of said stock the legal title to said portion of said railroad between Frankfort and Illinois and possibly the right to the possession of the same should be sold away and the connection and continuity of said line destroyed, and that if the same should follow, your receiver respectfully submits to the court whether it be not to the advantage of the holders of the mortgage bonds and of all parties in interest that the court protect the title, continuity, and possession of said line of railroad by the issue of receiver's certificates or otherwise, whereby said indebtedness specified in said Schedule B may be paid off.

Said receiver further respectfully represents that he is informed and believes that said creditors secured by said trust agreement are willing voluntarily to appear in this case and

to set forth their respective claims and ask the decision of this court thereon.

Wherefore said receiver asks that this honorable court will order said parties so to appear and interplead and set forth their respective claims in the matter of this State Line stock, that the court may thereupon take such action as equity may permit, considering the rights of the parties which are now under the protection of this court, and that in the meantime and until such decision may be arrived at the court will enjoin said American Loan and Trust Company of Boston from the threatened sale of said capital stock of said Frankfort and State Line Railroad Company.

EDWARD E. DWIGHT, *Receiver.*
By A. A. THOMAS, *His Solicitor.*

In addition to this it is shown that all the facts set out in this petition of the receiver are true, and that counsel for the trustees for the bondholders consented to their issue because they were unable to determine in their own minds what view the court might take as to their legal right to a lien upon this line of road under a mortgage given by a company that never had the legal title to the road. It was not ignorance of the facts that was in the way, but uncertainty as to the rule of law that would govern in such a case. The testimony of Thomas E. Stillman, of New York, and of the counsel for the trustees, on pages 788 to 794, shows clearly that this was the case.

The letter of Baker, Hurd & Hendricks, of counsel for the trustees, written to Judge Drummond on October 23, 1884, in regard to the McPherson certificates, shows the same thing. (See page 1170 of Record.)

The stock of the Frankfort and State Line road was under the control of these creditors, and they did not feel safe to allow it to be sold. Their exceptions to the McPherson certificates on page 1173 is to the same effect.

There can be no possible ground to believe that any one was deceived. The testimony shows that the stock would probably have sold for enough in the market to have satisfied these claims.

IV.

It is claimed that these certificates in question were for more than they should have been—that is, that the claims of the several creditors did not amount to that much.

We will take no time in the discussion of that question. The fact is that all the claims in question except Ritchie and McPherson were fought over by the railroad company and cut down below what they were really entitled to before the railroad company would give their notes for them. The McPherson and Ritchie claims were contested before certificates were issued to them before a master when testimony was taken.

Again, all these claims were tested in the severest manner possible before A. J. Ricks, the master in this case, and the bulk of the evidence in this case is upon that question. The master found they were correct and should not be disturbed. It was then all elaborately argued before Judge Gresham upon exceptions and they were again approved, and we see no necessity for further argument upon that question now.

V.

Subsequent to the issue of these receiver's certificates, in June, 1884, the trustees under the mortgage brought their suit to foreclose the mortgage on this line of road, filing the original bill at Indianapolis, or rather filing two bills there, the one in name of Leonard, a bondholder, as plaintiff, and the other in the name of the trustees, as plaintiff, the two afterwards being consolidated. In the fifth paragraph of each of these bills they set up the facts connected with the construction of the Frankfort and State Line Railroad Company; that it was built by the Western Construction Company under a contract with the Frankfort and State Line Railroad Company, under which the Construction Company was to receive all its stock except $200,000—$10,000

per mile in bonds and all local aid; that it did receive $1,800,000 of said stock; that the Construction Company afterwards held said stock to secure the amounts due its subcontractors for work done and material furnished. The trust agreement of March 22, 1883, is then set out, and they say that by its terms when the debts due these subcontractors were paid the said stock was to become the property of the T., C. & St. L. R. R. Company, to the end that it might be used to effect a consolidation of said Frankfort and State Line Railroad Company with it. It then recites the failure of the railroad company to pay these debts, and that the receiver, under the order of this court, has paid all of said debts by issuing and delivering to the respective creditors the receiver's certificates in question, which were made the first lien on line of said railroad from Kokomo to East St. Louis, and that the stock in question is now held by the receiver subject to the order of the court.

It also recites that by reason of this fact, and farther fact that the money in part arising from the sale of the bonds secured by its said mortgage was used in building of said line of road, that they are entitled to an equitable lien on said 67 miles of line of road known as the Frankfort and State Line railroad.

These averments are made, we say, in the bill filed by the trustees to foreclose the mortgage securing the bonds in question, which was filed June 17, 1884. The present bondholders' committee were also parties to that action.

The Frankfort and State Line Railroad Company was also a party to that suit, and made defense resisting the foreclosure of the mortgage on their line of road. The matter was referred to a master and considerable testimony taken, and upon his report and the evidence taken the court made its final decree in the foreclosure suit.

The final conclusion of the court on this subject is contained in the third paragraph of the final decree. In this final decree the court finds *that there never was any legal mort-*

gage executed by the T., C. & St. L. Railroad Company on that part of the line known as the Frankfort and State Line Railroad Company, extending from Frankfort to State line, except on the $11\frac{3}{4}$ *miles first constructed*, and then recites the facts substantially as above set out in the bill, and provides that because the money used in its construction came in part from the sale of the bonds secured by this mortgage, and because of the paying of these claims of the subcontractors by issuing to them receiver's certificates, which were made the first lien on the road from Kokomo to East St. Louis, whereby the court has come into possession of this stock of the Frankfort and State Line Railroad Company, which these creditors had held in pledge to secure them; that by reason of these things the first-mortgage bondholders were entitled to an equitable lien on that part of the line of road known as the Frankfort and State Line railroad, and directs that upon the sale of the road being made that the $1,800,000 of stock shall be turned over to the purchasers of the line to make good their title to that part of the line. (See pages 104 to 107 of Record.)

Thus it will be seen that these creditors, whose claims were for work done and materials furnished in building the road, and most of whose contracts were entered into before any mortgage was ever executed, were first induced by the invitation of the court and these bondholders, acting through their trustees, to surrender their notes, release their mechanic liens, surrender the $1,800,000 of stock held by them as security, which they were about to sell, and out of which there is no question but that they could have made their money at that time; that these same bondholders then, after having brought this about, ask the court to give them an equitable lien because of this on the part of the line represented by this stock, which the court does, and to make them a title to that part of the line. The court, finding that they never had any valid mortgage on it, directs the stock in question to be transferred to the purchasers. After all this these same

parties, who have become the purchasers of the road, come into court and ask that the lien of these holders of receiver's certificates be set aside. Never was the idea conveyed by the old couplet of Rabelais more fully verified:

"The devil was sick, the devil a monk would be;
The devil was well, the devil a monk was he."

VI.

LEGAL PROPOSITIONS.

Power to Issue Receiver's Certificates.

The doctrine, not only as to the power but the duty of the court, when it appoints a receiver, to authorize the issuing of receiver's certificates when it becomes necessary is so firmly founded in reason, as well as authority, that little need be said on that point, especially when applied to such species of property as a railroad.

It exists from necessity. The court does not voluntarily enter upon the management of a railroad, but from the moment when its power is invoked and a receiver is appointed it becomes the active manager of the road through its officer, the receiver. The property is generally in an embarrassed condition and will rapidly deteriorate unless kept in active operation. The court must, for the good of all parties concerned, keep it up and in a condition to run and properly transact its business. It has no funds with which to do this except the earnings, and when these are insufficent its only course is to direct the issue of certificates and make them chargeable upon the property as a first lien. It is not only necessary, but equitable, as every security-holder's obligation is improved by it. They get the benefit of it.

Courts should be and are usually careful in authorizing their issue, but when issued they should be and usually are equally careful that they should be paid.

They are, as they should be, the highest form of evidences of debt. The word of the court has gone forth to the world that they shall be paid, and courts, like Cæsar's wife, should be kept above suspicion. Courts must keep their promises and pay their obligations though all others fail. Dishonor at the fountain of justice will pollute the whole body politic.

When This Power is Exercised.

The power of the court, even without the consent of the mortgagees, to issue these certificates being unquestioned, we will consider for a moment when and under what circumstances it is exercised.

There are four classes of cases where receiver's certificates are usually issued and made chargeable upon the *corpus* of the property ahead of the mortgage lien:

1. Those necessary to defray the ordinary expenses of the receivership where the income of the road was not sufficient and receiver's certificates have been issued for that purpose.

2. Where the income of the road, which should have been used to pay operating expenses before the appointment of a receiver, has been diverted to paying interest on the bonds.

3. In some of the circuits wages due to employés for a certain period, usually six months, before the appointment of a receiver.

4. Where it becomes a necessity, in the judgment of the court, exercising a sound discretion in view of the surrounding circumstances, to order their issue, to preserve the property intact, and to keep it not only from going to waste, but also to maintain it in such a state as will not permit it to materially diminish in value in its hands. In case of a

railroad it must also keep it up as a going concern, and so that it can be operated with reasonable safety to the public.

These rules or principles have been applied to a great variety of claims.

In Jerome *vs.* McCarter, 94 U. S., 734, the receiver was authorized to and did raise on receiver's certificates $500,000 to complete a canal, which were made and held to be the first lien on the entire property, this work being done to save a certain land grant.

In Kennedy *vs.* St. Paul and Pacific Railroad Company, 2 Dillon, 448, the receiver in like manner was authorized to issue receiver's certificates for $5,000,000, which were charged as a first lien on the property, and was done, as in the former case, in order to comply with the terms of a grant of land to the company.

In the Bank of Montreal *vs.* Chicago, Clinton and Western Railroad Company, 48 Iowa, 518, the receiver was authorized to and did complete and build all the unconstructed portions of the road in his hands from Clinton to Iowa City, in that State, and issued for that purpose receiver's certificates to the amount of not exceeding $8,000 per mile, which were made a first lien on the property.

In Wallace *vs.* Loomis, 97 U. S., 146, the court appointed a receiver, and quoting from the order:

"With the power to put the road and property in repair, and to complete any unfinished portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating in value, and to save and preserve it for the benefit and interest of the first-mortgage bondholders and all other persons having an interest therein."

The order provided that he should raise the money for this purpose, to an amount stated, by the issue of receiver's certificates which were charged upon the property as a first lien. The final decree declared that money so raised should

be paid out of the proceeds of the sale of the road before the first-mortgage bonds.

In this connection see the remarks of Mr. Justice Bradley in appointing the receiver in Stanton *vs.* The Alabama and Chattanooga Railroad, 2 Woods, 506.

In a case where a railroad was in need of a large amount, of repairs, in order that it might be operated safely, the court authorized them and the receiver issued certificates therefor, which were chargeable upon the road. Hoover *vs.* Montclair, 29 N. J. (Eq.), 4. Again the same court authorized a receiver to issue receiver's certificates to pay back rent on loan for locomotives and made it chargeable as first lien on the road. Coe *vs.* N. J. Midland Railroad, 27 N. J. (Eq.), 38.

In Miltenberger *vs.* Logansport, etc., Railroad Company, 106 U. S., 286, the receiver was authorized to construct about five miles of road and to purchase a large amount of rolling stock and pay back rentals to a connecting line and issue certificates therefor, and the same were made and held to be a first lien ahead of all mortgages upon the line.

In Burnham *vs.* Bowen, 111 U. S., 776, the receiver was authorized to and did pay, ahead of the mortgage lien holders, a large bill for coal which had been made over a year before the receiver was appointed.

We will not take the time to review all the cases, as they present a great variety of instances in which the courts have authorized the receivers appointed by them to issue certificates and make them a first lien upon the property in their charge, and your honors are familiar with them.

It will readily be seen that they support the last rule we stated as to when and how courts would authorize the issue of receiver's certificates, making them a first lien. In some of these cases they were issued with and in others without the consent of the mortgagees.

In the case at bar the court could not, under these rules and the condition of facts then existing, do less than it

did do. Leaving out of the question for the present the mechanic liens which these parties had on the line of road, some of which were good and some bad, some doubtful and others partially good, these creditors had the stock of 67 miles of road in their hands as a pledge for their debts, which road was a link necessary to make the continuous line of road. The bondholders had no legal mortgage on that road, as the court in its final decree found, but only an equitable interest. These persons now objecting to this report were then all parties to the suit in which that decree was rendered not only by their trustees, but also by their bondholders' committee, and from that decree, which finds, and finds truly, that they never had a legal mortgage on it, there has been no appeal taken by them. There never has been any bill of review filed by them to set it aside. On the contrary, they have purchased, reorganized, and now hold the road under it.

These creditors, as we have said, so holding in pledge this stock, were about to sell it. The sale of the stock would have carried the title of the road with it, and the continuity of the line would have been destroyed or at least placed in great jeopardy. No court, we take it, could have hesitated to have made the order which was made, even without the consent of the parties in interest and certainly not where all these parties were consenting. If the court has the power to replace a bridge or repair a track to preserve the property or even build a portion of road to make more valuable the whole, it certainly has the power to protect it by preventing a link of 67 miles being taken out when it can do so at $2,000 per mile. One other thought in this connection. These parties had no legal mortgage at that time, as shown by the facts and as found by the final decree. Their only equitable right, at this time, to this line of 67 miles was because the road had been partially built with money arising from the sale of some of their bonds. These creditors, to whom these certificates were issued, had as high an equity,

at least, as this. The money coming to them was for
labor and material which had constructed it. Labor
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to that line which passed with the stock.

The Effect of Consent.

We have been considering thus far the legal status of
the case at the time of the issue of these certificates as if the
matter was now on hearing as to their issue. Let us now
look at their present status.

The parties who are now objecting to them being a first
claim on the property are, as the exceptions show, Sylvester
H. Kneeland, the purchaser of the road for himself and the
other holders of first-mortgage bonds of the St. Louis di-
vision extending from Kokomo to East St. Louis, the bond-
holders having become the purchasers.

These parties, by their trustees, all consented to their issue
and being made a first lien before the decree ordering them
was made. This is shown by the decree itself, by the report
of the master, and the evidence filed with his report. The
chairman of the general committee of the bondholders at
that time was also consulted and consented. The bond-
holders, as shown by the evidence, had organized separate
committees for each division, and these separate committees
had chosen John Felt Osgood, of Boston, as the general
chairman of all these committees, and he was so acting at
that time when he gave his consent. Not only that, but
the present chairman of the bondholders' committee had
knowledge, as shown, of it, and acquiesced in that course.

The proposition will not be denied because it is uniformly
enforced that the consent of the trustees is binding on each
and every bondholder in this matter unless such trustees

were acting corruptly or fraudulently at the time, which will not be claimed in this case.

Not only was this consent given at the time, but was acquiesced in from that period until after the final hearing. In the fall of 1884, when Henry McPherson had filed his petition in the case asking receiver's certificates to pay his claim, Messrs. Baker, Hord & Hendricks, attorneys for the bondholders, filed their brief and objections before the master and before Judge Drummond resisting the issue to McPherson, and in both of these arguments, which were introduced in evidence and marked Exhibits 215 and 216, they not only recognize the validity of these former certificates issued in January, 1884, but say that it was by the consent of all persons and was a necessity that they should have been issued. We have also called attention to the 5th paragraph of the bill, subsequently filed by the trustees, to foreclose the mortgage, in which they not only assert the fact that they have been issued by consent and made a first lien, but they base certain claims and equities in their favor on that ground.

In view of these facts, under what rule of law or equity can these parties who have consented to and acquiesced in the orders made now come into court at this late day and open their lips?

Jones, in his work on Railroad Securities, sections 539 and 540, in speaking on this subject, deduces the following conclusion from the cases, and they are founded on the solid rocks of equity and good faith:

"The question of the priority of receiver's certificates and loans over existing mortgage liens has not very often been a matter of litigation, because in almost all instances in which the courts have authorized receivers to borrow money and make their obligations a first lien upon the property the mortgagees have themselves asked for the orders for these purposes in advance, or have expressly assented to the making of them, and, of course, they are in such cases precluded from afterwards claiming any priority over the lien thus

at least, as this. The money coming to them was for their labor and material which had constructed it. Labor is entitled to an equal equity with capital, and in addition to their equal equity they had the legal right to the stock, which would have given them the title to the road, as well as the right to the $130,000 of these uncollected subsidies voted to that line which passed with the stock.

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created for the purpose of preserving the mortgaged property. * * *

"When bondholders or trustees in their behalf, after obtaining the appointment of receivers, have petitioned that they might be allowed to borrow money on the credit of the property, there can be no question that they waive the priority secured to them by their mortgage in favor of such debts. Even when their waiver is not expressly made it is implied under such circumstances. Moreover, even if such petition be not made by or in behalf of such bondholders, but by the receiver himself or by any other creditor, if the bondholders or mortgage trustees, being parties to the proceedings, and before the court, make no objections to the creating of such debts and liens upon the property by the receivers, they cannot afterwards object to according priority to the liens so created."

Upon this question the case of Solon Humphreys *vs.* Allen, receiver, 101 Illinois, 499, is in point and pertinent. In that case the receiver made application for authority to issue receiver's certificates to pay $67,831.51 for money due for services, supplies, etc., incurred by the company within six months before the appointment of a receiver, and also $81,600 for money borrowed by the company and expended in improvements on the road and for the protection of the credit of the company, and for which last a chattel mortgage had been executed upon certain rolling stock of the road, and representing that the best interests and preservation of the road demanded it should be done, the court made the order and directed that they be made the first lien upon the road. The trustee of the first-mortgage bondholders was a party to the suit, but not the bondholders. The receiver issued the certificates and Solon Humphrey, with other bondholders, became parties to the suit subsequently, and at time of rendering the decree, and before, they objected to the order making them a first lien, and the final decree left the question open, but afterwards the court adhered to the original order, and the Supreme Court held

that if they desired to question the power or wisdom of the court in making such order they must have done so before they were issued and passed into the hands of third persons or into the hands of creditors, and that after their issue and sale it was too late to raise the question.

The Supreme Court of the United States, in Union Trust Company *vs.* Midland Company, 117 U. S., on page 461, lays down the same doctrine. After speaking of the right of persons who were not parties to the suit, by their trustee or in person, when the order was made to issue such receiver's to afterwards question them, the opinion then goes on to state that the opposite is true when such trustee was a party at the time of the issue. The court on this point says:

"As to receiver's certificates issued with the sanction of the court, after the trustees become parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

In the case at bar not only were the trustees a party to the suit at the time of the issue of the certificates in question but consented to their issue.

In Miltenberger *vs.* Logansport Railroad Company, 106 U. S., 286, where the receiver had been authorized to issue certificates to pay for rentals of another line, building about five miles of new road, etc., some of the bondholders subsequently objected to these being a first lien and charged fraud in connection with them. In speaking on this question the court says:

"It did not comport with the principles of equity for the appellants to lie by and see the court and receiver dealing with the property in the manner now complained of and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill, that the piece of road from Clymer's Station to Logansport and the bridge and the

and and rolling stock and the other property acquired by the receiver and now alleged to have been acquired by him without authority were subject to the lien of the first mortgage, and now claim the proceeds of all that property without paying the debts incurred for acquiring it.

"*A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders consequences which result from the inequitable negligence and supineness of a party to the suit or of those represented by him.*"

We think it is clear, not only according to the plainest principles of equity and justice, but in the well-marked pathway of the adjudicated cases, that these parties, having consented to their issue and acquiesced in them, cannot now be heard to question them at this day, even if it were possible that a question could have originally been raised.

Estoppel.

In addition to the estoppel which would generally arise from the consent and acquiescence of the bondholders in the issue of the certificates in question, there are additional facts in this case which add to the usual binding effect of an estoppel if that were possible.

1. By this consent the creditors to whom they were issued parted with valuable rights on account of it, viz: They surrendered the $1,800,000 of Frankfort and State Line Railroad Company stock, out of which there is no question from the evidence but that they could have made their money at that time. They also cancelled and discharged the line of road from their mechanic liens and dismissed their suits.

2. These bondholders, on the strength of it, acquired valuable rights, viz: They acquired the stock in question and set that up in their bill of foreclosure and the fact of the issue of these certificates as a reason why that 67 miles of

road should be included in their decree of foreclosure which the court gave them. They also received the benefit of the release of the mechanic liens.

By the plainest principles of law this would raise an estoppel in two different ways:

The one of record, by the assertions in the bill and the decree to which they were parties, and which they will not now be heard to contradict.

The other an equitable estoppel, which arises by the act, word, or voluntary conduct of another one who has relied on this in good faith and has been led thereby to change his position for the worse, and the other has in consequence acquired some corresponding right either of contract, remedy, or property.

On this latter class of estoppels see Pomeroy's Equity, sections 804, 805.

There is also another thought on this head, which is: These parties now objecting are the purchasers of the road as well as the bondholders, it having been purchased by them. The proceedings in the suit and decree all recognize these certificates valid and as a first lien on the line of road from Kokomo to East St. Louis.

It is well settled that a purchaser is bound by the record in force at the time of the sale under which he purchases, and is estopped from setting up any claim which contradicts that.

On that point we will only cite the case of Swann *vs.* Wright's Executors, 110 U. S., 590, where the purchaser at the sale attempted to set aside a part of the receiver's certificates which had been ordered issued before the time of the sale, and which were pending on reference at that time. The court refused to go into the question as to whether or not they were issued fraudulently, because the purchaser was bound by the records in force at the time of the sale of the road and under which he purchased, and was estopped

from setting up any such claim, especially so unless he should tender back into court his deed for the property and ask to have the sale set aside.

Rights of Purchasers of Receiver's Certificates.

We will not discuss the rights of innocent purchasers of this class of paper, as we think it has been conclusively shown that the court had power to order their issue; that it was its duty to so do, and that by consenting to this and by depriving these creditors of valuable property and by acquiring valuable rights themselves in consequence of this these parties now objecting are forever estopped and cannot question the matter now.

We will suggest, however, that the certificates are made negotiable in form, being payable to bearer, and, as shown by the master's report, have all passed into the hands of third persons before due, without notice of any defenses, for valuable consideration, and not one of them is now held by the original parties.

While it is true that they are not negotiable paper in the full sense of the term, yet courts recognize the fact that persons purchasing the paper have a right to rely on the promise of the court as printed thereon, and they are entitled to the full protection of the court when consent has been given to their issue, as in the case at bar. If such consent had not been given, then they must take them subject to valid objections.

The right of plaintiff to appeal and the other legal points have been so fully presented in the brief of Mr. Pratt that I will add nothing to them at this time.

W. I. Babb,
Of Counsel for Appellees.

October 14, 1891.